Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

NO. _____, Misc.

77-1319

JOSEPH D. SMITH
CLAYTON L. HUMMEL, Petitioners,

-vs-

STATE OF INDIANA, Respondent.

****

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

****

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IN THE

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

****

Petitioners, Clayton L. Hummel and Joseph D. Smith, by their counsel, Joseph M. Johnson, pray that a Writ of Certiorari issue to review the judgment of the Indiana Court of Appeals, entered on May 26, 1977.

OPINION BELOW

The opinion of the Indiana Court of Appeals is reported at ____ Ind. App. ___, 263 N. E. 2d 227, a copy of which opinion is appended hereto and identified as "Appendix A".

JURISDICTIONAL STATEMENT

The judgment of the Indiana Court of Appeals, sought to be reviewed, was dated and entered on May 26, 1977. The order of the Indiana Court of Appeals, denying Petitioners' timely filed petition for rehearing, was dated and entered July 11, 1977. The order of the Supreme Court of Indiana, denying Petitioners' timely filed petition to transfer, was dated and entered December 20, 1977. The jurisdiction of this Court is founded on 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Under circumstances where: (a) A state Implied Consent Statute provides that no person shall be placed under arrest for having committed the offense of driving or operating a motor vehicle while under the influence of intoxicating liquor, until he has first been offered the opportunity to submit to a chemical test for intoxication to be administered by a person certified as a valid chemical test operator by the department of toxicology of the Indiana University School of Medicine; (b) Persons were placed under arrest for having committed such offense, without ever having been offered the opportunity to submit to such a chemical test for intoxication; were such persons deprived of their liberty without due process and the equal protection of the law in violation of Fourteenth Amendment to the Constitution of the United States, and were such arrests unreasonable seizures of such persons under the Fourth Amendment to the Constitution of the United States?

2. Under circumstances where: (a) A state Implied Consent Statute provides that any person who drives, operates or is in actual physical control of a motor

vehicle on the public highways of the state shall be deemed to have given his consent to a chemical test for intoxication when asked by any law enforcement officer; (b) Such statute further defines a "chemical test" as an analysis by persons using such techniques and equipment as shall have been approved by the department of toxicology of the Indiana University School of Medicine of the breath, blood, urine or other bodily substance for the determination of the presence of alcohol or drugs or a combination of alcohol and drugs in such quantities as to constitute intoxication or "under the influence" as that term may be defined by statute; (c) Such statute further provides that any law enforcement officer who has probable cause to believe that any person has committed the offense of driving or being in actual physical control of a vehicle while under the influence, in his presence or view, or who has probable cause to believe that any person who has been involved in a motor vehicle accident has committed such offense though not in his presence or view, shall not place such person under arrest for such offense until he has first offered to such person the opportunity to submit to a chemical test for intoxication to be administered by a person certified as a valid chemical test operator by the department of toxicology of the Indiana University School of Medicine; (d) Blood samples were extracted from persons' bodies without their consent or with their consent to a "chemical test" for intoxication, as defined in said statute, after being involved in motor vehicle accidents; and (e) The blood samples were extracted and tested to determine the presence of alcohol by persons not certified as valid chemical test operators by the department of toxicology of the Indiana University

School of Medicine, using techniques and equipment which had not been approved by the department of toxicology of the Indiana University School of Medicine; were the extractions of the blood samples from such persons' bodies unreasonable searcnes and seizures under the Fourth Amendment to the Constitution of the United States?

3. Under circumstances where blood samples are obtained from persons' bodies by way of unreasonable searches and seizures by state law enforcement officers, as described in paragraph two above, were the arrests of such persons, upon warrants issued upon probable cause determinations, considering as evidence the fruit of such unlawful searches and seizures, unreasonable seizures of such persons under the Fourth Amendment to the Constitution of the United States?

4. Under circumstances where: (a) Persons are arrested by state law enforcement officers, upon state warrants for having committed the offense of driving a motor vehicle while under the influence -- causing the death of another, which warrants were issued upon the basis of the evidence of illegally seized blood samples, as aforedescribed, and upon other evidence provided in the probable cause affidavits, which provided as follows:

> "The undersigned, being first duly sworn upon his oath, deposes and says:
>
> That he is a police officer for the Indiana State Police and did have occasion on the 16th day of September, 1974, to investigate an accident in Adams County, Indiana, wherein the undersigned did determine from various

witnesses in said investigation that the above named Defendant was driving an automobile and did crash into the rear of a certain horse drawn buggy as alleged in the Affidavit filed herewith, as a result of which accident two persons, namely: Jonas E. Hilty and Pete E. Hilty, then and there died.

The undersigned further states that he did smell alcohol upon the breath of the above named Defendant at the scene of said accident and did procure a blood sample from said Defendant and said sample has subsequently revealed alcoholic content in excess of the legal [p]resumption of an intoxicated person under the Statute as charged herein.

WHEREFORE, the undersigned prays upon hearing held, the Court issue a warrant forthwith for the arrest of the Defendant herein."

"The undersigned, being first duly sworn upon his oath, deposes and says:

That he is a police officer for the City of Decatur, and did have occasion on the 12th day of September, 1974, to investigate an accident in the City of Decatur, wherein, the undersigned did determine from various witnesses and in the said investigation that the above named Defendant was driving an automobile and did pass a certain car on the right leaving the travelled portion of the roadway and did come back on said highway, and cross the centerline and crash into a car driven by Mark Allan Woodard, as a result of which

accident the said Mark Allan Woodard, did thereafter die.

The undersigned further states that he did smell alcohol upon the breath of the above named Defendant and did procure a blood sample from said Defendant and said sample has subsequently revealed an alcoholic content in excess of the legal presumption of an intoxicated person under the Statute as charged herein.

WHEREFORE, the undersigned prays that upon hearing held the Court issue a warrant for the arrest of the Defendant herein as charged in the information filed herewith;" and

(b) A state statute prescribes that if the information constituting the probable cause for arrest, contained in a probable cause affidavit, is based on credible hearsay, the affidavit shall contain reliable information supplied to the affiant by a credible person, named or unnamed, and it shall also contain: (1) Affirmative allegations that the credible person spoke with personal knowledge of the matters contained therein, (2) The facts within the personal knowledge of the credible person, and (3) The facts within the affiant's knowledge as to the credibility of the credible person; were the seizures of such persons, by virtue of said arrests, unreasonable under the Fourth Amdendment to the Constitution of the United States for the reason that such probable cause affidavits failed to state sufficient facts and circumstances from which a neutral and detached magistrate could have determined that probable cause existed for the arrests of such persons, for having committed the offense of driving a

motor vehicle while under the influence of intoxicating liquor -- causing death of another.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Amendment IV, Constitution of the United States U. S. C. A Const. Amend. 1 to 4, p. 361:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2. Amendment XIV, Section 1, Constitution of the United States U. S. C. A. Const. Amend. 14 to end, p. 4:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. Indiana Code 9-4-1-54(b)(1), Burns Ind. Stat. Ann. -- Code Ed. § 9-4-1-54(b)(1), p. 238-239:

> "Any person who while under the influence of intoxicating liquor or unlawfully under the influence of narcotic or other habit-forming or dangerous, depressant or stimulant drugs drives a vehicle and when so driving causes the death of another person, is guilty of a felony and, upon conviction, shall be imprisoned for an indeterminate period of not less than one (1) year nor more than five (5) years; or shall be imprisoned for an indeterminate period of not less than one (1) year nor more than two (2) years to which shall be added a fine of not less than two hundred fifty dollars ($250.00) nor more than five thousand dollars ($5,000.00). Upon conviction, the Court shall recommend the suspension of the current driving license of the person so convicted for a period of one (1) year and until such person shall give and maintain for a period of three (3) years proof of his financial responsibility in the manner specified in Chapter 159 of the Acts of 1947 [9-2-1-1 -- 9-2-1-45], as amended, and the commissioner of motor vehicles shall thereupon comply with such recommendations, and should the Court fail to make such mandatory recommendation, or should the Court fail to make the appropriate mandatory recommendation, the

commissioner shall proceed to act in the manner as if such recommendation had been made by the Court."

4. Indiana Code 9-4-1-56(2), Burns Ind. Stat. Ann. -- Code Ed. § 9-4-1-56(2), p. 251:

"If it is alleged in the indictment or affidavit, or upon the trial, that the defendant was under the influence of intoxicating liquor when he committed reckless homicide, or that he was under the influence of intoxicating liquor when he drove a vehicle, the Court may admit evidence of the amount of alcohol in the defendant's blood at the time alleged, as shown by a chemical analysis of his breath, urine, or other bodily substance. Such evidence may be accompanied by other relevant evidence such as eyewitness testimony about defendant's appearance, speech and conduct at the time alleged. Evidence that there was, at that time, five hundredths per cent (.05%) or less, by weight of alcohol in his blood, is prima facie evidence that the defendant was not under the influence of intoxicating liquor sufficiently to lessen his driving ability within the meaning of the statutory definitions of the offenses. Evidence that there was, at the time from five hundredths percent (.05%) to ten hundredths per cent (.10%) by weight of alcohol in his blood is relevant evidence but is not to be given prima facie effect in indicating whether or not the defendant was under the influence

of intoxicating liquor within the meaning of this act. Evidence that there was, at the time, ten hundredths percent (.10%) or more, by weight of alcohol in his blood, is prima facie evidence that the defendant was under the influence of intoxicating liquor sufficiently to lessen his driving ability within the meaning of the statutory definitions of the offenses."

5. Indiana Code 9-4-4.5-1, Burns Ind. Stat. Ann. -- Code Ed. § 9-4-4.5-1, p. 330:

"Implied consent to chemical test for intoxication. -- Any person who drives, operates, or is in actual physical control of a vehicle on the public highways of this state shall be deemed, by virtue of such driving, operation or control, to have given his implied consent to submit to a chemical test for intoxication when asked to submit to such test by any law enforcement officer pursuant to the provisions of this chapter (9-4-4.5-1 -- 9-4-4.5-6)."

6. Indiana Code 9-4-4.5-2(d), Burns Ind. Stat. Ann. -- Code Ed. § 9-4-4.5-2 (d), p. 331:

"The term 'chemical test' for the purposes of this chapter means an analysis by such persons using such techniques and equipment as shall have been approved by the department of toxicology of the Indiana University school of medicine of the breath, blood, urine or other bodily substance for the determination of the presence of alcohol or drugs, or

a combination of alcohol and drugs in such quantities as to constitute intoxication or 'under the influence' as that term may be defined by statute."

7. Indiana Code 9-4-4.5-3, Burns Ind. Stat. Ann. -- Code Ed. § 9-4-4.5-3, p. 331:

"Opportunity to submit to chemical test prior to arrest. -- Any law enforcement officer authorized to enforce the laws of this state regulating the use and operation of vehicles on public highways who has probable cause to believe that any person has committed the offense of driving or being in actual physical control of a vehicle while under the influence, in his presence or view, or who has probable cause to believe that any person who has been involved in a motor vehicle accident has commited (committed) such offense, though not in his presence or view, shall not place such person under arrest for such offense until he has first offered to such person the opportunity to submit to a chemical test for intoxication to be administered by a person certified as a valid chemical test operator by the department of toxicology of the Indiana University school of medicine. Any such person who agrees to submit to such chemical test for intoxication shall not be arrested for driving while under the influence, but shall accompany the officer to the nearest available chemical test device for the purpose of taking such test as a condition of the

driving privilege, (a) If such chemical test results in prima facie evidence that such person is not under the influence, he shall not be arrested and charged with such offense, and he shall be released immediately.
(b) If such chemical test results in relevant evidence, coupled with other evidence, that such person is under the influence, he may be arrested and charged with such offense.
(c) If such chemical test results in prima facie evidence that such person is under the influence, he shall be arrested and charged with such offense. (d) If any person shall refuse to submit to such chemical test, pursuant to the terms of this chapter (9-4-4.5-1 -- 9-4-4.5-6), he may be arrested and charged with such offense, and his current driving license shall be delivered to the judge of the court in which such charge is filed, along with a certification of refusal to submit to chemical test for intoxication on a form designed and furnished by the commissioner of motor vehicles. (e) Nothing in this chapter shall be interpreted as prohibiting an arrest and charge for any other offense of the laws of the state or its political subdivisions as may be prescribed by applicable law."

8. Indiana Code 9-4-4.5-4, Burns Ind. Stat. Ann. -- Code Ed. § 9-4-4.5-4, p. 332-333:

"Refusal to submit -- Judicial hearing prior to arraignment --

Matters to be determined -- Findings. When a certification of refusal to submit to a chemical test is submitted to the court, it shall hold a separate hearing on the matter of the test refusal, prior to the arraignment on the criminal charge, for the determination of the following matters:

(a) Did the law enforcement officer have probable cause to believe that the accused had committed the offense of driving or being in actual physical control of a vehicle while under the influence? In determining this issue, it shall be proper for the court to consider matters alleged in a sworn probable cause affidavit submitted by the law enforcement officer or other witnesses, or the sworn testimony of any witnesses made a matter of record. Such affidavit or testimony may contain statements of, but shall not necessarily be limited to, the following:

(i) Erratic or unusual driving behavior;
(ii) Appearance of accused when detained, i. e., watery or bloodshot eyes, flushed or pale face, expanded or contracted pupils of the eyes, condition of clothing, etc.;
(iii) Behavior of accused when detained, i. e., ability to speak and/or express himself orally, finger dexterity, steadiness on feet, ability to perform simple tests requiring normal coordination or balance, etc.;
(iv) Odor of alcoholic beverages, presence of alcoholic beverage containers or drugs;

(v) Any other fact perceived by the law enforcement officer with reference to the accused or any report received from another person by the officer with reference to the accused, including reports of witnesses, physicians, psychiatrists, etc.

In the determination of probable cause, it shall also be proper for the court to consider photographs, tape recordings, both audio and video, and motion pictures taken of the accused for the purpose of illustrating his physical and mental condition at time of detention.

(b) Did the law enforcement officer offer to the accused the opportunity to submit to a chemical test for intoxication before placing the accused under arrest for such offense, and was the accused physically and mentally able to provide a breath sample? In determining these issues, it shall be proper for the court to consider the written statements of the law enforcement officer on the certification of refusal of chemical test for intoxication form, in addition to other relevant evidence, including testimony of the officer, the accused, and witnesses, if any.

(c) After the issues in (a) and (b) above are determined, the court shall then determine whether or not the accused did in fact refuse to submit to a chemical test for intoxication.

If the court finds that a refusal to submit to a chemical test for intoxication was because of mental

or physical incapacity not related to intoxication, such refusal and the reasons therefor shall be reported to the commissioner of motor vehicles for such action as shall be deemed proper by him on the form provided by the commissioner. If the court finds that the mental or physical incapacity would affect the driving ability of the accused, it shall forward such finding to the commissioner of motor vehicles along with the current driving license of the accused, otherwise, the driving license shall be returned to the accused.

If the Court finds that such refusal was made wilfully and knowingly or because of the state of intoxication of the accused, it shall forward such finding to the commissioner of motor vehicles on a form to be provided by the commissioner, along with the current driving license of the accused, and it shall recommend to the commissioner that the driving privileges of the accused remain suspended for a period of one (1) year from the date of said finding, and the commissioner shall comply with said recommendation.

If the Court finds that the accused did not refuse to submit to a chemical test for intoxication or if the Court finds that the law enforcement officer did not properly proceed under this chapter (9-4-4.5-1 -- 9-4-4.5-6), no further action shall be taken under this chapter, and the Court shall proceed with the arraignment, unless the finding includes one lack of probable cause, in which case the charge of driving or being in actual physical control

of a vehicle while under the influence shall be quashed upon the motion of the Court."

9. Indiana Code 9-4-4.5-6, Burns Ind. Stat. Ann. -- Code Ed. § 9-4-4.5-6, p. 333:

"Chemical test operators -- Selection training and certification -- Inspection of chemical devices. -- The director of the state department of toxicology of the Indiana University School of Medicine is hereby authorized and empowered to adopt the necessary rules and regulations to set standards for the selection, training, certification and re-certification of chemical test operators and to provide for the periodic inspection of chemical devices. No chemical test for intoxication shall be considered as evidence for the purpose of this chapter (9-4-4.5-1 -- 9-4-4.5-6) if it is not performed by a person certified as a valid operator by the state department of toxicology of the Indiana University School of Medicine, and no equipment shall be used for such chemical tests which has not been inspected and approved under the rules and regulations adopted by such department. Rules and regulations promulgated pursuant to I. C. 1971, 9-4-4-3 (repealed) are hereby preserved for the purposes of this chapter and may be amended pursuant to the authority herein granted."

10. Indiana Code 9-1-6-2 (a), (b) and (c), Burns Ind. Stat. Ann. -- Code Ed. § 9-1-6-2, (a), (b), and (c), p. 20-21:

"Affidavit -- Contents and form -- Evidence of probable cause. -- No warrant for search or arrest shall be issued until there is filed with the justice of the peace, judge of any city court or magistrate's court or the judge of any court of record, an affidavit, particularly describing the house or place to be searched and the things to be searched for, or particularly describing the person to be arrested, and alleging substantially the offense in relation thereto, and that the affiant believes and has good cause to believe that such things as are to be searched for are there concealed, or that the person to be arrested committed said offense, and setting forth the facts then in knowledge of the affiant or information based on credible hearsay, constituting the probable cause. When based on credible hearsay, the affidavit shall contain reliable information supplied to the affiant by a credible person, named or unnamed, and it shall contain the following:
(a) Affirmative allegations that the credible person spoke with personal knowledge of the matters contained therein.
(b) The facts within the personal knowledge of the credible person.
(c) The facts within the affiant's knowledge as to the credibility of the credible person."

STATEMENT OF THE CASE

On September 12, 1974, at approximately 11:30 o'clock p. m., petitioner, Smith, was involved in an automobile accident on a state highway in the City of Decatur,

Adams County, Indiana. A witness to the accident, was traveling south on highway number 27 when a car in which defendant was later found in the rear seat, passed him on the right side. It was raining and as the car passed the witnesses car and turned back onto the roadway it spun and proceeded across the highway and into the northbound lane. A car traveling north struck the car in which Petitioner, Smith, was found, in the right side. (Tr. pp. 217-218) The witness observed the car passing him on the right side but did not observe whether the car was being driven by a man or a woman. (Tr. p. 226) After the collision, the witness stopped his car and got out and looked in the car which had passed him on the right. The driver's door was open but he did not see anyone in the car. He then went to the other car and observed a man pinned behind the wheel. (Tr. pp. 219-220) The witness then saw some lights on in a house and people coming out the back door. He went over and asked them to call the police and an ambulance. (Tr. p. 220) After talking to the people who came out of the house, the witness went back to the car which had passed him on the right and again looked through the open door and saw Petitioner, Smith, in the back

seat. (Tr. p. 221)

At approximately 11:34 o'clock p. m. a City Police Officer arrived at the accident scene to investigate and lend assistance. The Officer observed Smith in the rear seat of a 1970 Mercury and a male person pinned behind the wheel of a 1969 Oldsmobile. (Tr. pp. 183-189) The officer observed five beer containers some of which were in the Mercury and some of which were out of it on the ground. The tops of four of the cans were intact and the cans had not been opened. One of the cans had the tab top removed and had appearently been opened by someone. (Tr. p. 184) The can which did not have a top and one other can were completely empty and a third can was partially empty. Some of the cans had obviously been ruptured and could have exploded in the accident (Tr. pp. 254-257)

When the Officer looked in the Mercury Petitioner Smith was in the rear seat and he smelled an odor of alcohol, however, he did not smell Smith's breath. He did not know whether the odor was on Smith's breath, on his clothes or whether it was simply in the car. (Tr. p. 255)

Petitioner, Smith, and the person in the Oldsmobile were taken, by ambulance, to a local hospital. After arriving at the

hospital, another Officer, upon directions from the investigating officer, requested a nurse to extract a sample of blood from the defendant's body, which she did. (Tr. p. 266)

The Officer and a deputy sheriff, stated that they smelled an odor of alcohol on Smith's breath. However, it was not shown whether such information was ever conveyed to Officer Jennings prior to the extraction of the blood sample. (Tr. pp. 266 and 263 respectively) However, the nurse who extracted the blood sample and treated Smith stated she did not smell any odor of alcohol on Petitioner, Smith's breath and when asked to describe his conversation stated:

> "Well, he was coherent, co-operative, no slurring speech, concerned over the injured, very concerned over the man, of course, he was in pain and in shock from his injuries, but other than that he was ..." (Tr. p. 212)

When asked whether she observed any symptoms of intoxication, she stated she did not.

The ambulance driver, who helped pick Smith up and place him in the ambulance and helped carry him into the hospital stated he did not recall smelling any odor of alcohol on Smith's breath. (Tr. p. 193) An ambulance attendant, who also helped

remove Smith from the car, place him in the ambulance and carry him into the hospital, stated he also did not smell any odor of alcohol on Smith's breath. (Tr. p. 197)

A second nurse, who observed Smith in the hospital x-ray room shortly after he was brought into the hospital and who was very close to defendant, stated that she did not smell any odor of alcohol on Smith's breath. (Tr. p. 208) Finally, the doctor who treated Smith at the hospital at approximately 12:15 o'clock a. m., stated he did not smell any odor of alcohol on Smith's breath, that his speech was not slurred and that he answered questions "forthrightly". (Tr. pp. 201-202)

The nurse who extracted the blood sample, stated she had not been certified as a "chemical test operator" by the Indiana University School of Medicine Department of Toxicology. (Tr. p. 215) Further, as evidenced by the letters of Robert B. Froney, Ph. D., of the Indiana University School of Medicine, Director, State Department of Toxicology, the State Department of Toxicology had not certified or approved any technique for performing direct blood analysis to determine the alcohol content of blood. Further, the department of toxicology had not trained

any technicians to perform such tests and had not inspected or approved any equipment to be used in performing such tests. (Tr. pp. 270-271) Consequently, Petitioner, Smith, was not offered the opportunity to submit to a chemical test for intoxication to be performed by a person certified as a "chemical test operator", as required by I. C. 9-4-4.5-3, and his arrest was in violation of I. C. 9-4-4.5-3 which mandates that such offer be made to him before any arrest.

The occupant of the Oldsmobile automobile was also taken to the local hospital, was then transferred to another hospital and died approximately four hours after the accident.

Petitioner, Smith, was charged in the Adams Circuit Court by information on September 20, 1974, with having committed the offense of Driving Under The Influence of Intoxicating Liquor - Causing Death of Another. Also, on September 20, 1974, an Affidavit for Probable Cause for Issuance of Arrest Warrant, was filed, whereupon, a warrant was issued for Petitioner, Smith's arrest, Smith was arrested and released on bond. He was arraigned on October 8, 1974, and ordered to appear in Court on November 6, 1974, for the purpose of entering a plea.

On November 6, 1974, Petitioner, Smith, requested and was granted until December 6, 1974, within which to enter his plea.

II.

On September 16, 1974, at approximately 11:45 o'clock p. m., Petitioner, Hummel, was involved in an automobile and horse drawn buggy collision on a state highway in rural Adams County, Indiana. The investigating officer arrived at the accident scene at 11:57 p. m. and observed Petitioner Hummel, lying on the pavement, "he appeared to have facial lacerations, bleeding from the face and forehead." (Tr. p. 191) The buggy had been driven by an Amishman who was accompanied by his wife and two infants. (Tr. p. 310) The buggy had some lighting equipment and a slow moving vehicle emblem located on it. However, it was not shown whether the lights were lit prior to or at the time of the collision. (Tr. p. 273-274) Petitioner, Hummel, was driving an Oldsmobile automobile traveling south on highway 27 and ran into the rear of the buggy, which was on the highway in the right hand lane of traffic, also traveling south. The investigating officer testified that Petitioner, Hummel, told him that he had been going approximately sixty to sixty-five miles per hour. As

soon as Petitioner, Hummel, saw the buggy in front of him he applied his brakes and then skidded fifty-four feet, struck the buggy and continued to skid another approximately one hundred seventy feet (Tr. p. 29) The speed limit in the area was fifty-five miles per hour, however, it was sixty-five until changed shortly before the accident. (Tr. p. 200) After Hummel's car commenced skidding, he kept it under control and in fact the car continued in the proper lane, in a near straight path on down the road, until it came to rest as shown by the photographs of the skid marks. (Tr. pp. 202 and 270)

Upon furthering his investigation, the investigating officer discovered that the driver of the buggy and his wife were also injured and the two infants appeared to be deceased. Other officers arrived and assisted and ambulances were called to transport the injured to hospitals.

The investigating officer stated that when he assisted Hummel at the scene of the accident he smelled an odor of alcohol on his breath and found one empty beer can some distance from the crash scene, although, there were no containers in the Oldsmobile automobile. (Tr. p. 194) However, on cross-examination, referring to a prior

statement made by the investigating officer, he was questioned and testified as follows:

> Q. Do you also recall this portion of the conversation, "Why did you have a blood sample taken of Mr. Hilty (driver of the buggy) Well, normally under these circumstances where a fatal is involved, this is the procedure we go through, both drivers of both vehicles have blood samples taken. Question: Is that the reason too then that you had a blood sample taken of Mr. Hummel? Answer: That, and in conjunction with the fact that I felt that he had been drinking, as to how much I had no idea. You had no idea how much he had been drinking? (Tr. p. 294, emphasis added)
> A. That's correct. (Tr. p. 294)

After Hummel arrived at the hospital, at the request of the investigating officer, another police officer informed a nurse that the Police needed a blood sample taken, so the nurse notified Mr. Hummel of such and asked if one could be taken. Mr. Hummel said it was alright. (Tr. p. 314) Of course, pursuant to the Indiana Implied Consent Law, I. C. 9-4-4.5-1, by virtue of driving a motor vehicle upon a public highway, he had already consented to a chemical test for intoxication, as defined in said law. Petitioner, Hummel, was not, in any sense of the word, "offered" the opportunity to submit to a chemical test for intoxication by a person certified as a valid chemical

test operator by the Department of Toxicology of the Indiana University School of Medicine using techniques and equipment approved by the Indiana University School of Medicine, Department of Toxicology, as required by I. C. 9-4-4.5-3. (Tr. p. 320)

The blood sample extracted from Hummel's body was allegedly analyzed for the determination of blood-alcohol content, however, as evidenced by the exhibited letters of Dr. Robert B. Forney, Ph. D., Director, State Department of Toxicology, Indiana University School of Medicine, no one in the State of Indiana has been certified to perform direct blood analysis for alcohol content. Likewise, no equipment or techniques to be used in making such analysis, have been approved, certified or inspected. Consequently, the nurse who extracted the blood sample had not been properly certified, the equipment used to extract the blood had not been approved, certified or inspected the vial into which the blood was placed had not been approved, certified or inspected, the anticoagulent in the vial had also not been approved and most crucially, the actual test was performed by a certified chemical test operator and the technique and equipment used to perform the test had not been inspected or approved as required

by the law. Clearly, then, Hummel was never offered the opportunity to submit to a chemical test for intoxication to be performed by a person certified as a valid chemical test operator by the Department of Toxicology of the Indiana University School of Medicine using techniques and equipment approved, certified or inspected by the Department.

Petitioner, Hummel, was charged in the Adams Circuit Court by information on September 27, 1974, with having committed the offense of Driving Under The Influence of Intoxicating Liquor - Causing Death of Another. Also, on September 27, 1974, an Affidavit for Probable Cause for Issuance of Arrest Warrant, was filed, whereupon, a warrant was issued for Hummel's arrest. Hummel was arrested and released on bond on October 2, 1974.

Petitioner, Hummel, was arraigned on October 8, 1974, and ordered to appear in Court on November 6, 1974, for the purpose of entering a plea. On November 6, 1974, Petitioner, Hummel, requested and was granted until December 6, 1974, within which to enter his plea.

III

On December 6, 1974, Petitioners each filed a Notice of Motion to Dismiss in the Adams Circuit Court, and on December 9, 1974, they each filed Motions to Dismiss, affidavits, memorandums and Supplemental Memorandums of Law in support of the motions.

Petitioners' Motions to Dismiss, relative and pertinent to this petition, alternatively and cumulatively alleged:

> 1. That the Court did not have jurisdiction over their persons, since their arrests were proscribed by and in violation of the mandatory procedure of I. C. 9-4-4.5-3 (Portion of Indiana Implied Consent Law), and such arrests were, therefore, affected by denial of their Constitutional Right to due process of law under the Fourteenth Amendment to the Constitution of the United States. (Motion to Dismiss, page 2)
>
> 2. That the Court did not have jurisdiction over their persons for the reason that their arrests were unreasonable and illegal seizures of their persons under the Fourth Amendment to the Constitution of the United States, because the probable cause affidavits, upon which probable cause for such arrests were determined and warrants were issued were in substantive part based upon and tainted with facts and circumstances obtained as the result of an illegal search and seizure, namely, the blood samples extracted from their bodies and the results of the alleged analysis thereof. Petitioners

alleged that the blood samples were the result of an unlawful search and seizure in violation of the Fourth Amendment to the Constitution of the United States, for the reason that: (a) the law enforcement officers who secured the blood samples, did not have probable cause to believe that petitioners had committed the offense of driving a motor vehicle while under the influence prior thereto, a Constitutional condition precedent and which condition is contained in I. C. 9-4-4.5-3 (Portion of Indiana Implied Consent Law); and (b) the "mandatory" requirements and procedure of I. C. 9-4-4.5-2(d) which defines a "chemical test" as an analysis by persons using techniques and equipment as shall have been approved by the Department of Toxicology of the Indiana University School of Medicine of the breath, blood, urine or other bodily substance for the determination of the presence of alcohol in such quantities as to constitute intoxication or "under the influence".

3. That the Court did not have jursidiction over their persons, because the probable cause affidavits, upon which probable cause for arrest was determined, did not state sufficient facts and circumstances from which the Court could have independently determined probable cause and therefore, their arrests were illegal and unreasonable seizures of their persons under the Fourth Amendment to the Constitution of the United States. (Motion to Dismiss, page 1, 2 and 3)

On January 3 and 10, 1975, hearings were held for the purpose of presentation of

evidence in support of Petitioner's motions. During such hearing Petitioners presented evidence, by way of testimony and exhibits, showing that there was not probable cause for the respective law enforcement officers to believe that Petitioners had committed the offense of driving while under the influence prior to the time blood samples were extracted from their bodies. Petitioners' evidence also showed that the extraction of the blood samples and alleged chemical analysis of the samples, was unquestionably performed by persons who had not been certified as valid chemical test operators, using techniques and equipment which had not been approved, as required by law.

On February 25, 1975, the trial court rendered rulings and findings of fact and ordered that the causes be dismissed and that petitioners be discharged, also, on March 1, 1975, the Court rendered supplemental rulings and findings of fact. Copies of the findings and judgment of the trial court are appended hereto and identified as "Exhibit B" - Smith case and "Exhibit C" - Hummel case. Also, copies of the trial court's supplemental findings and judgment are appended hereto and identified as "Exhibit D" - Smith case and "Exhibit E"

Hummel case. In summary, the trial court found:

1. That Smith and Hummel were not arrested at the respective scenes of the accidents or at the hospitals, prior to the extraction of the blood samples; (Appendix B, page 5 to 7, Appendix C, page 5 to 7)

2. That the procedure in removing the blood samples from petitioners' bodies and the examination of the samples as to the alcoholic content of petitioners' blood was improper; (Appendix B, pages 19-23, Appendix C, pages 19-23)

3. That the investigating officers, in each case, did not have the prerequisite probable cause to believe that petitioners had committed the offense of driving while under the influence of intoxicating liquor, prior to having blood samples extracted from petitioners' bodies; (Appendix D, pages 4-5, Appendix E, pages 4-5)

4. That the State's probable cause for arrest affidavits in each case, were insufficient; and (Appendix B, pages 9-20, Appendix C, pages 9-20)

5. That Smith and Hummel's arrests were illegal. (Appendix B, pages 25-28, Appendix C, pages 25-28)

From the findings and judgment of the trial court, the State of Indiana appealed, alledging that the above findings of the trial court were erroneous. The cases were consolidated for appeal by the Court of Appeals.

In petitioners' timely filed brief in the Court of Appeals, petitioners urged; inter alia:

1. That the failure of the State to afford them the opportunity to submit to a "chemical test" for intoxication, as defined in Ind. Code 9-4-4.5-2(d) in the manner prescribed in Ind. Code 9-4-4.5-3, was a violation of the mandate of the Implied Consent Law, particularly, I. C. 9-4-4.5-3, and denied them very significant procedural and substantive rights, resulting in a denial of due process of law (Appellees' Briefs p. 66,67), and blood samples secured in violation of such statute were illegal searches and seizures. (Appellants' Briefs, p. 87, 88)

2. That their arrests were proscribed by the provisions of I. C. 9-4-4.5-3 and were therefore unlawful. (Appellees' Brief, p. 76, 77, 78)

3. That the probable cause affidavits did not state sufficient facts and circumstances from which the trial court could have determined that probable cause existed for their arrests, that therefore, the arrest warrants were illegally issued, and were null and void, and their arrests upon such warrants were unreasonable seizures under the Fourth Amendment to the Constitution of the United States. (Appellees' briefs, p. 87 through 96)

On May 26, 1977, the Indiana Court of Appeals rendered its opinion, the full text of which is appended hereto, and identified as "Appendix A", however, pertinent to this petition, the Indiana Court of Appeals held:

1. With regard to the effect of a law enforcement officer's failure to offer a person the opportunity to submit to a chemical test for intoxication to be administered by a person certified as a valid chemical test operator, the Court stated:

> "The failure of an arresting officer to accord the individual arrested an opportunity to be chemically tested for the presence of alcohol in his blood in no way affects the validity of his arrest. The only effect of the arresting officer's failure to provide the arrestee with the chemical test provided for in the Implied Consent Statute would be that the person arrested could not have his driver's license suspended for a period of one year prior to trial." (____ Ind. App. ____, 363 N. E. 2d 227 at 232)

2. With regard to the Petitioner's contentions, that the probable cause for arrest affidavits were insufficient because they were based in part on the results of illegal searches and seizures, and in part on the conclusions of the affiant thereby failing to relate sufficient facts and circumstances to the magistrate to enable him to make a meaningful determination of

probable cause, the Court stated:

> "At the outset we reject Humel's and Smith's contention that the blood tests could not properly be considered by the magistrate solely because the arresting officers did not comply with the Implied Consent Statute by first offering Hummel and Smith the opportunity to take a blood test before being placed under arrest, and because the equipment and test operator were not properly certified."
>
> * * * * *
>
> "Therefore, since the probable cause affidavits were not used for the purpose of implementing the mandates of the Implied Consent Statute, i. e., the revocation of driving privileges for one year, the trial court erred in not considering the results of the blood tests for the reasons argued by Hummel and Smith." (____ Ind. App. ____, 363 N. E. 2d 227 at 234, 235)

3. With regard to the sufficiency of the probable cause affidavits, in summary, the Court stated:

> "Although the probable cause affidavits filed in the cases at bar are lacking somewhat in specificity, and certainly should not be considered as models for future use, it is the opinion of this Court that sufficient information was contained therein to allow the magistrate to determine that probable cause existed for the arrests of Hummel and Smith, and the trial court erred when it granted Hummel's and Smith's Motions to Dismiss." (____ Ind. App. ____, 363 N. E. 2d 227 at 236)

The Court failed to consider, whether the trial court erred in finding that the officers did not have probable cause to believe that Smith and Hummel had committed the offense of driving a motor vehicle while under the influence of intoxicating liquor prior to having the blood samples extracted from their bodies.

The Indiana Court of Appeals in the cases of Klebs v. State (1974) ____ Ind. App. ____, 305 N. E. 2d 781 and Jones v. State (1974) ____ Ind. App. ____, 315 N.E. 2d 403 had held that the requirements of the Implied Consent Statute, I. C. 9-4-4.5-1 - 9-4-4.5-6 must be met prior to the test results being accepted in evidence in criminal prosecutions under I. C. 9-4-1-54, the criminal statute proscribing driving while under the influence of intoxicating liquor - causing the death of another person.

The cases of Klebs v. State, supra, and Jones v. State, supra, were cited, thoroughly discussed, and relied upon by Petitioners in their Supplemental Memorandum of Law, filed in the trial court, in support of their Motions to Dismiss. These cases were also cited, thoroughly discussed and relied upon by Petitioners in their Appellate Briefs.

However, the Indiana Court of Appeals completely ignores these cases, its own precedent, and did not even as much as mention the cases in its opinion. The effect of the opinion and judgment of the Indiana Court of Appeals, then, was to deny to petitioners, not only the substantive but also the procedural due process of law provided for by the Indiana Implied Consent Law (I. C. 9-4-4.5-1 through 9-4-4.5-6), and to deny Petitioners equal protection of the law, all in violation of the Fourteenth Amendment to the Constitution of the United States.

Of course, these deprivations of Constituional Rights were not ripened until the rendering of the opinion of the Indiana Court of Appeals, as the trial court had dismissed the cases against petitioners, and up to the time of the rendering of the opinion of the Indiana Court of Appeals, these rights had not been denied.

Consequently, the opinion of the Indiana Court of Appeals gave rise to these two additional constitutional questions.

In summary, the opinion-judgment of the Indiana Court of Appeals, holding that the arrests of petitioners, although unequivocably prohibited by I. C. 9-4-4.5-3, were lawful, and that petitioners were not

entitled to the protection and procedure set forth in the Implied Consent Law (I. C. 9-4-4.5-1 through 9-4-4.5-6), denied petitioners substantive and procedural due process of the law and denied them equal protection of the law, as they were entitled to be treated the same as all other citizens of the State of Indiana, all in violation of the Fourteenth Amendment to the Constitution of the United States.

After the Indiana Court of Appeals rendered its opinion, reversing the trial court, petitioners timely filed a petition for rehearing, which by order dated July 11, 1977, was denied without comment. Also, by order dated December 20, 1977, the Supreme Court of Indiana, without comment, denied petitioners' timely filed petition for transfer.

The Constitutional questions ripened by the opinion of the Indiana Court of Appeals, were not permitted to be raised by way of the petition to transfer, as the grounds for petitions to transfer are limited to those enumerated in Appellate Rule 11 (B)(2) of the Indiana Rules of Appellate Procedure. Appellate Rule 11 (b)(2) provides:

> "Errors upon which a petition to transfer shall be based may include:

> (a) that the decision of the Court of Appeals contravenes a ruling precedent of the Supreme Court, indicating the ruling precedent, or
>
> (b) that the decision of the Court of Appeals erroneously decides a new question of law, concisely stating the same, or
>
> (c) that there is a conflict in the decision with another decision of another district of the Court of Appeals stating concisely the conflict and decision in which it occurs, or
>
> (d) that the decision of the Court of Appeals correctly followed ruling precedent of the Supreme Court, but that such ruling precedent is erroneous or is in need of clarification or modification, or
>
> (e) that the decision of the Court of Appeals fails to give a statement in writing of each substantial question arising on the record and argued by the parties. If this error is relied upon, the petition shall set forth such portions of the record so as to affirmatively disclose such failure, and establish that petition was prejudiced thereby."

ARGUMENT

I.

PETITIONERS' ARREST, WITHOUT EVER HAVING BEEN OFFERED THE OPPORTUNITY TO SUBMIT TO A CHEMICAL TEST FOR INTOXICATION, PRIOR THERETO, AS MANDATED BY THE INDIANA IMPLIED CONSENT STATUTE, DENIED PETITIONERS

DUE PROCESS AND EQUAL PROTECTION OF THE LAW, IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, AND WAS AN UNREASONABLE SEIZURE OF THEIR PERSONS, IN VIOLATION OF THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Prefatory to petitioners' argument on these questions, the peculiar circumstances from which this petition arose, should be noted as explanation for these questions being here raised for the first time. Simply stated, petitioners had not been denied the rights of due process of law and equal protection of the law, until the rendering of the opinion of the Indiana Court of Appeals, which is here sought to be reviewed.

Petitioners were charged by informations in the Adams Circuit Court of Adams County, Indiana, however, upon motions to dismiss, filed by petitioners, the respective causes were ordered dismissed and petitioners were ordered discharged. After the dismissal of the causes, the State appealed, the judgmentsof dismissal of the trial court, to the Indiana Court of Appeals. It was not petitioners who appealed, rather, it was the State of Indiana; Petitioners, as appellees, had not been

denied due process of law and too, had not been denied equal protection of the law, as the trial court, did not even question the applicability of the Implied Consent Law (I. C. 9-4-4.5-1 through 9-4-4.5-6), rather determined only that the procedure and requirements of the Statute had not been followed and that, consequently, the extractions and analysis of the blood samples were inadmissible as evidence in the probable cause determination, and that the probable cause affidavits failed to state sufficient facts and circumstances from which probable cause could be determined.

Reversing the trial court, the Indiana Court of Appeals held that the Indiana Implied Consent Law (I. C. 9-4-4.5-1 -- 9-4-4.5-6) had absolutely no application in the causes and that the admissibility of the blood sample extractions and analysis should have been determined under the traditional Schmerber test enunciated by this Court in the case of Schmerber v. California (1966) 384 U. S. 757, 16 L.Ed. 2d, 908 86 S.Ct. 1826.

Assertion of these constitutional questions in petitioners' appellate briefs, filed in the Court of Appeals, would have been, at most, an improper assertion of abstract or hypothetical questions. There-

fore, petitioners urge that, the raising of these questions at this time, does not come within the proscription of the general rule, that the Supreme Court of the United States will not consider questions not raised or disclosed by the record brought before it, and which were not considered by the courts below, or at least, that an exception to such rule should be made. Exceptions to such rule have been held proper. Anderson v. United States (1974) 417 U. S. 211, 41 L.Ed. 2d 20, 94 S.Ct. 253; Youakim v. Miller (1976) 425 U.S. 231, 47 L.Ed. 2d 701, 96 S.Ct. 1399.

The first "implied consent" law enacted in Indiana was enacted in the 1969 legislature and became effective in January, 1970. Acts of 1969, Chapter 64, page 80. This Act provided that a motor vehicle driver or operator lawfully arrested for driving a motor vehicle while under the influence of intoxicating liquor, was required, "when within his capacity to do so", to provide "physical, scientific evidence" of such driver's blood-alcohol content. The term "physical, scientific evidence" was defined as follows:

> "For purposes of this act, the term "physical, scientific evidence" shall mean evidence revealing the alcoholic content of the blood, such evidence

> being obtained by breath analysis as set out in Section 2 of this act, approved by and administered in a manner approved by the state department of toxicology; Provided, that such test shall be administered within two (2) hours of the time of arrest." (Acts 1969, Chap. 64, pp. 80-81, emphasis added)

The 1969 Act was included in the publication of the Indiana Code of 1971 (codification of all Indiana statutory law) and identified as Title IX, Chapter 4, Section 1 (I. C. 9-4-1). However, Acts 1971, Vol. 2, Pub. Law No. 130, p. 557, Amended I. C. 9-4 by adding a chapter to be numbered Chapter 4.5, which contains the present "implied consent" law, and which specifically repealed I. C. 9-4-4.

Consequently, prior to the 1969 implied consent law, in Indiana, the acquisition and use of blood-alcohol analysis was controlled solely by the traditional limitations of the Fourth Amendment of the Constitution of the United States and Article 1, Section 11, of the Indiana Constitution. After passage of the 1969 law, only "breath" tests were controlled by the provisions of the new law. The acquisition and use of other tests, such as a direct blood analysis, continued to be controlled solely by the traditional

limitations. Therefore, direct blood analysis, so-called "blood tests" did not come within the limitation or scope of the provisions of the "implied consent" law until passage in 1971 of Public Law 130, I. C. 9-4-4.5-1 through 9-4-4.5-6.

The pertinent provisions of the present Implied Consent Law are quoted above.

A case of great significance, prior to the enactment of the present "implied consent" law, was DeVaney v. State (1972) 259 Ind. 483, 288 N. E. 2d 732. There the Court held that a blood sample taken from the defendant and analyzed, was proper, basing its decision on the decision of the United States Supreme Court in Schmerber v. California (1966) 384 U. S. 757, 86 S. Ct. 1826, 16 L.Ed. 2d 908. It is very important to note that although the DeVaney case was decided in November, 1972, after enactment of the present "implied consent" law, the case arose out of an accident which occurred on January 29, 1969. (288 N.E. 2d 732 at 734) Consequently, the DeVaney decision was not made under the present implied consent law and therefore is no longer controlling.

Since the enactment of the present Implied Consent Law two important decisions of the Indiana Court of Appeals have dealt

specifically with the construction and applicability of the Implied Consent Law in prosecutions under Ind. Code 9-4-1-54(b) commonly referred to as the DUI statute (driving under the influence statute).

First, the ruling of the Court in Klebs v. State (1974) ____ Ind. App. ____, 305 N. E. 2d 781 held that a result of a breathalyzer test was inadmissible as evidence in a prosecution for driving while under the influence of intoxicating liquor -- causing death of another, the same offense charged against Hummel and Smith. The test result was ruled inadmissible for each of three reasons:

1. The test was not administered by an operator certified by the department of toxicology;

2. The equipment used in the test was not inspected and approved by the department of toxicology; and

3. The operator used techniques not approved by the department of toxicology.

The Court stated:

> "We cannot conclude, as a matter of law, that the State sustained its burden in establishing a foundation for admission of the results of the breathalyzer test. There was a fatal evidentiary absence germane to each of the three requirements." (305 N. E. 2d 781 at 783, Emphasis added)

The Court in reaching its ruling relied on Ind. Code 9-4-4.5-6 and 9-4-4.5-2, portions of the Implied Consent Statute, The most pertinent part of the ruling states:

> "Following the accident police officers took Klebs to the Hammond Police Station where Lieutenant Awe administered the breathalyzer test pursuant to I. C. 9-4-4.5-1 and 9-4-4.5-3, Ind. Ann. Stat. § 47-2003c and § 47-2003e (Burns 1973). The test results indicated .19% by weight of alcohol in Klebs' blood.
>
> The Indiana legislature has provided that evidence of the alcohol content of a defendant's blood, as shown by a chemical analysis of his breath, is admissible as evidence. Evidence of .10% or more, by weight of alcohol in the defendant's blood, is prima facie evidence that he was under the influence of intoxicating liquor sufficiently to lessen his driving ability to such an extent as to endanger other persons using the public highways. I. C. 9-4-1-56, Ind. Ann. Stat. § 47-2003 (Burns 1973). Another statute sets forth certain requirements that must be met prior to the test results being accepted as evidence. That statute reads:
>
> "The director of the state department of toxicology of the Indiana University School of Medicine is hereby authorized and empowered to adopt the necessary rules and regulations to set standards for the selection, training, certification and recertification of chemical test

> operators and to provide for the periodic inspection of chemical devices. No chemical test for intoxication shall be considered as evidence for the purpose of this chapter (9-4-4.5-1 -- 9-4-4.5-6) if it is not performed by a person certified as a valid operator by the state department of toxicology of the Indiana University School of Medicine, and no equipment shall be used for such chemical tests which has not been inspected and approved under the rules and regulations adopted by such department ..." (Emphasis added) I. C. 9-4-4.5-6 ..." (Emphasis added)

The emphasis added to the quotation of I. C. 9-4-4.5-6 was added by the Court.

The second case is that of Jones v. State (1974) ____ Ind. App. ____, 315 N. E. 2d 403, an appeal from convictions of involuntary manslaughter and reckless homicide. Both convictions were reversed. It is significant to note that the offense of involuntary manslaughter is not contained in I. C. 9-4-1-54, the DUI Statute, and there is no interrelationship between such offense and I. C. 9-4-1-56, which authorizes use of chemical tests for intoxication in prosecutions under I. C. 9-4-1-54 and consequently, no relationship with the Implied Consent Statute.

Nevertheless, the Court ruled that the results of a direct blood analysis (the same type test performed in Smith and Hummel's cases) was inadmissible in both prosecutions for the reason that the device or equipment used in the performance of the test had not been inspected and approved.

Most significantly the Court stated:

"While defendant's objection contained several alternative grounds, it asserted the equipment used to perform the test was not approved or certified as required by Indiana's implied consent statute, I. C. 1971, 9-4-4.5 (Burns Code Ed.).

That statute was adopted by our legislature to promote the use of chemical tests in drunken and drugged driving offenses. However, a stricture was imposed. I. C. 1971, 9-4-4.5-6 (Burns Code Ed.) provides in part:

'The Director of the state department of toxicology ... is hereby authorized and empowered to adopt the necessary rules and regulations ... to provide for the periodic inspection of chemical devices. No chemical test for intoxication shall be considered as evidence for the purpose of this chapter if it is not performed by a person certified as a valid operator ... and no equipment shall be used for such chemical tests which has not been inspected and approved under the rules and regulations adopted by such department. Rules and regulations promulgated pursuant

to I. C. 1971, 9-4-4-3 (repealed) are hereby preserved ... and may be amended..." (our emphasis)

In addition, Rule 2 of the Department of Toxicology (Burns Admin. R. & R. [47-2003h]-2[1] requires that all chemical devices (A) be inspected at least once each year; and (B) be certified at least once each year.

[1, 2] We need not decide whether certification of devices per se has thus become a requirement to producing an admissible test result. It certainly is not mandated by the statute. The statute does mandate that the device be inspected and approved under the rules and regulations adopted by the department of toxicology. This the state failed to establish. The test result was therefore inadmissible." (315 N.E. 2d 403 at 404)

The Court, in Jones, suggested its rationale for interrelating the Implied Consent Law and its strictures, with the provisions of Ind. Code 9-4-1-54 and its implementing statute, 9-4-1-56.

Referring to the Implied Consent Statute, the Court stated:

"That statute was adopted by our legislature to promote the use of chemical tests in drunken and drugged driving offenses." (315 N.E. 2d 403 at 404)

While the rationale was suggested in Jones, it was clearly stated in Rose v. State (1976) ____ Ind. App. ____, 345 N.E. 2d 257, an appeal from a conviction of

operating a motor vehicle while under the influence of intoxicating liquor. There the Court stated:

> "Furthermore, both I. C. 1971, 9-4-1-54(b), supra, and the Indiana Implied Consent statute, I. C. 1971, 9-4-4.5-1, et seq. (Burns Code Ed.), have the common purpose of eliminating from our public highways the dangers posed by intoxicated drivers. For this reason, such statutes should be construed with reference to each other and harmonized, if possible, because they are in pari materia." (345 N.E. 2d 257 at 260)

Therefore, as illustrated by the foregoing, there is a very essential and significant relationshi p between the provisions of the Implied Consent Law and the criminal statute proscribing driving while under the influence and its implementing statute, Ind. Code 9-4-1-56, which authorizes the use of chemical tests showing blood-alcohol content in prosecutions under I. C. 9-4-1-54 and which establishes the degree of relevance of various percentages of blood-alcohol content.

Therefore, the Indiana Court of Appeals, in Rose v. State, supra, held that the statute proscribing driving while under the influence of intoxicating liquor, Ind. Code 9-4-1-54(b), (which includes the offense of driving while under the influence of

intoxicating liquor - causing the death of another) and the Implied Consent Statute, Ind. Code 9-4-4.5-1 -- Ind. Code 9-4-4.5-6, are in pari materia and as it held in Klebs v. State, supra, and Jones v. State, supra, before a "chemical test" could be admitted into evidence in a criminal prosecution for driving while under the influence or driving while under the influence - causing death of another, the test must have been a "chemical test" as defined in Ind. Code 9-4-1-4.5-2(d) and it must have been performed following all of the strictures, procedures and requirements of the other provisions of the Implied Consent Law, including those stated in Ind. Code 9-4-4.5-3.

It is patently clear that the Indiana Implied Consent Law controls the matter of obtaining and using blood samples in proseuctions for driving while under the influence and the Indiana Court of Appeals has, as previously illustrated, so held. The opinion of the Indiana Court of Appeals, sought tc be reviewed, did not distinguish its prior decisions, rather, completely ignored and did not even mention such decisions.

All persons driving motor vehicles in the State of Indiana are entitled to be

treated alike and the judgment of the Indiana Court of Appeals, holding that petitioners, Smith and Hummel, were not entitled to be offered the opportunity to submit to a "chemical test" for intoxication, as defined in the Implied Consent Law (Ind. Code 9-4-4.5-2(d)), to be performed by a person certified as a valid chemical test operator by the department of toxicology of the Indiana University School of Medicine; that the alleged results of an analysis of the blood samples could properly have been considered by the trial court in its probable cause, for arrest, determinations; and that the failure of law enforcement officers to offer Smith and Hummel the opportunity to submit to a chemical test for intoxication in no way affected the validity of their arrests, patently denied petitioners their right to equal protection of the law, under the Fourteenth Amendment of the Constitution of the United States.

The Fourteenth Amendment of the Constitution of the United States imposes an obligation upon each state, to afford equal protection of its laws to every citizen. As stated in Cooper v. Aaron (1958) 358 U. S. 1, 3 L.Ed. 2d 5, 78 S. Ct. 1401:

> "The controlling legal principles are plain. The command of the Fourteenth Amendment is that no "State" shall deny to any person within its jurisdiction the equal protection of the laws. 'A State acts by its legislature, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or the officers or agents by whom its powers are executed, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government ... denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning.'" (358 U. S. 1 at 16, 17, 3 L.Ed. 2d 5 at 16, emphasis added)

Also, even though, as here, a statute may be fair or its face, the action of a state through its officers, charged with its administration or enforcement, may be of such a character as to constitute a denial of equal protection of the laws. Bailey v. Alabama (1910) 219 U. S., 55 L.Ed. 191, 31 S.Ct. 145. Further, the Court in Shelley v. Kraemer (1947) 334 U. S. 1, 92 L.Ed. 1161, 68 S.Ct. 836, observed:

"That the action of state courts and of judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment is a proposition which has long been established by decisions of this Court. That principle was given expression in the earliest cases involving the Fourteenth Amendment. Thus, in Virginia v. Rives, 100 U.S. 313, 318, 25 L.Ed. 667, (1880), this Court stated: 'It is doubtless true that a State may act through different agencies, either by its legislature, its executive, or its judicial authorities; and the prohibitions of the amendment extend to all action of the State denying equal protection of the laws, whether it be by action of these agencies of another ...

Similar expressions, giving specific recognition to the fact that judicial action is to be regarded as action of the State for purposes of the Fourteenth Amendment, are to be found in numerous cases which have been recently decided..." (334 U.S. 1 at 14, 15, 82 L.Ed. 1161 at 1181)

See also, Brinkerhoff v. Faris Trust & Savings Company v. Hill (1930) 281 U. S. 673, 74 L.Ed. 2d 1107, 50 S.Ct. 451. Bailey v. Alabama (1910) 219 U. S. 219, 55 L.Ed. 191, 31 S. Ct. 145.

Under the Indiana Implied Consent Statute (Ind. Code 9-4-4.5-1 -- 9-4-4.5-6) every motorist of the State of Indiana is entitled to be treated equally. The affect of the

judgment of the Indiana Court of Appeals was to deny petitioners the equal protection of such law, resulting in a deprivation of their liberty. The deprivation of petitioners right to equal protection of the laws is excentuated by the prior decisions of the Indiana Court of Appeals, applying the strictures, procedures and requirements of the law, in prosecutions under Ind. Code 9-4-1-54(b), the statute proscribing driving while under the influence of intoxicating liquor, for the purpose of determining the admissibility of the results of breath and blood tests. Klebs v. State, supra, and Jones v. State, supra.

Not only were petitioners denied equal protection of the law, by virtue of the opinion of the Indiana Court of Appeals, they were also denied due process of law under the Fourteenth Amendment to the Constitution of the United States. Denying that petitioners were entitled to be offered the opportunity to submit to a chemical test for intoxication by a person certified as a valid chemical test operator, using approved techniques and equipment, and denying that they were entitled to the application of the other rights and protections afforded by the Indiana Implied Consent Law,

the Indiana Court of Appeals unequivocably denied petitioners due process of law.

In Ex Parte Kemmler (1890) 136 U.S. 436, 34 L.Ed. 519, 105 S.Ct. 930, regarding the due process guarantee of the Fourteenth Amendment, the Court stated:

> "As due process of law in the Fifth Amendment referred to that law of the land which derives its authority from the legislative powers conferred on Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law, so, in the Fourteenth Amendment, the same words refer to that law of the land in each State, which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. Undoubtedly the Amendment forbids any arbitrary deprivation of life, liberty or property, and secures equal protection to all under like circumstances in the enjoyment of their rights." (136 U.S. 435 at 448, 449, 34 L.Ed. 519 at 524, emphasis added)

Not only does the language of the Indiana Implied Consent Statute (Ind. Code 9-4-4.5-1 -- 9-4-4.5-6) make it patently clear that its provisions are for the protection of a motorist's liberty and is for the

protection of every motorist but the prior opinions of the Indiana Court of Appeals has so held. Klebs v. State, supra, and Jones v. State, supra.

Not only does the statute proscribe an arrest without first offering a motorist the opportunity to submit to a chemical test for intoxication, it further provides that:

> "If such chemical test results in prima facie evidence that such person is not under the influence, he shall not be arrested and charged with such and he shall be released immediately. (Ind. Code 9-4-4.5-3 (a), emphasis added)

Unquestionably, a violation of the due process clause of the Fourteenth Amendment may be accomplished by the state judiciary in the course of construing or applying an otherwise valid state statute. Brinkerhoff - Faris Trust & Savings Co. v. Hill, supra; Borie v. Columbia (1960) 378 U. S. 347, 12 L.Ed. 2d 894, 84 S.Ct. 1697.

The invidiousness of the discriminatory and arbitrary treatment of petitioners, affected by the opinion of the Indiana Court of Appeals, is embelished by the further fact that, not only were petitioners denied their statutory right to have a

chemical test for intoxication performed, blood samples were extracted from their bodies, analyzed and used as evidence to obtain their arrests.

Clearly, the opinion of the Indiana Court of Appeals affected a denial of petitioners' right to due process of the law and should not be condoned.

The arrests of petitioners, in flagrant disregard of the proscription of Ind. Code 9-4-4.5-3, constituted an unreasonable seizure of their persons. Ind. Code 9-4-4.5-3 in pertinent part provides:

> "Any law enforcement officer authorized to enforce the laws of this state regulating the use and operation of vehicles on public highways who has probable cause to believe that any person has committed the offense of driving or being in actual physical control of a vehicle while under the influence, in his presence or view, or who has probable cause to believe that any person who has been involved in a motor vehicle accident has commited (committed) such offense, though not in his presence or view, shall not place such person under arrest for such offense until he has first offered to such person the opportunity to submit to a chemical test for intoxication to be administered by a person certified as a valid chemical test operator by the department of toxicology of the

> Indiana University School of Medicine. Any such person who agrees to submit to such chemical test for intoxication shall not be arrested for driving while under the influence, but shall accompany the officer to the nearest available chemical test device for the purpose of taking such test as a condition of the driving privilege, (a) If such chemical test results in prima facie evidence that such person is not under the influence, he shall not be arrested and charged with such offense, and he shall be released immediately." (Emphasis added)

Unequivocably, under the above statute, a portion of the Indiana Implied Consent Statute, a driver of a motor vehicle cannot be arrested, for having committed the offense of driving a motor vehicle while under the influence, with or without a warrant, until two conditions have first been met:

> "(1) The person must first be 'offered' the opportunity to submit to a "chemical test" for intoxication, that is an analysis of the breath, blood, urine or other bodily substance, by a person certified as a valid chemical test operator by the department of toxicology of the Indiana University School of Medicine. The test cannot be compelled and cannot be administered by anyone not properly certified; and

(2) The result of the chemical test must establish at least "relevant evidence" of intoxication. "Relevant evidence" is defined in I.C. 9-4-1-56 as a blood-alcohol content of between .05 percent and .10 percent."

Clearly, petitioners were never offered the opportunity to submit to a "chemical test", consequently, the first condition was not met. As there was no "chemical test", there was no test result and the second condition could never be met.

It is fundamental that the Fourth Amendment proscribing unreasonable searches and seizures protects "persons" against unreasonable seizures as well as property.

Also, the overriding function and basic purpose of the Fourth Amendment, guaranteed to citizens of each state through the due process clause of the Fourteenth Amendment, is to safeguard personal privacy, security and dignity of individuals against arbitrary or unwarranted intrusion by the State. Schmerber v. California (1966) 384 U.S. 757, 16 L.Ed. 2d 908, 86 S.Ct. 1826.

The arrests of petitioners, clearly proscribed by the Indiana Implied Consent Statute, can be characterized as nothing less than an arbitrary and unwarranted intrusion by the State, affected by the opinion of the Indiana Court of Appeals, upon petitioners' security.

The preconditions for an arrest, set forth in I. C. 9-4-4.5-3, are not of a trivial nature, rather, these preconditions were clearly intended to prevent the subjecting of innocent persons to the jeopardy of serious criminal prosecutions. Under the statute even though there may be probable cause to believe that a motorist has committed the offense, if the result of a chemical test constitutes prima facie evidence that the person is not under the influence to a marked degree, then, such person cannot be arrested for such offense but must be released immediately. Of course, if petitioners had submitted to a "chemical test" as defined in the statute (I. C. 9-4-4.5-2(d)), the tests may have resulted in prima facie evidence that they were not "under the influence", rather, petitioners had blood samples extracted from their bodies and allegedly analyzed by some unknown person, who may or may not have possessed the qualifications to perform an accurate blood-alcohol analysis. The requirement of the Implied Consent Statute, requiring that the persons performing chemical tests be certified and requiring that the testing techniques and equipment be approved, were

for the purpose of assuring accuracy and reliability of such tests, thereby, providing valuable protection to motorist.

The fact that petitioners were not arrested until several days after automobile accidents, upon arrest warrants, is of no consequence, for the statute simply and unequivocably states an officer "shall not be placed such person under arrest for such offense until he has first offered to such person the opportunity to submit to a chemical test for intoxication ..." (Ind. Code 9-4-4.5-3) To permit an arrest "for such offense" to be made several days later would even be more offensive.

Petitioners arrests, clearly proscribed by Indiana Code 9-4-4.5-3, were unreasonble seizures of their persons. The blatant and obvious disregard of the clear and plain language of Ind. Code 9-4-4.5-3, by the Indiana Court of Appeals, affronts the concepts of fairness which serves as the main stay for all constitutional guarantees. In this regard it is well to recall the statement made by this Court in Mapp v. Ohio (1961) 367 U.S. 643, 6 L.Ed. 2d 1081, 81 S.Ct. 1684:

> "Nothing can destroy a government more quickly than its own failure to observe its own laws..."

> (367 U.S. 643 at 659, 6 L.Ed. 2d 1684 at 1692)

and the words of Mr. Justice Brandeis, dissenting in Olmstead v. United States (1928) 277 U. S. 438, 72 L.Ed. 944, 48 S.Ct. 564:

> "Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example... If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." (227 U.S. 438 at 485, 72 L.Ed. 944 at 959)

To conclude, as did the Indiana Court of Appeals, in spite of the clear language and intent of Ind. Code 9-4-4.5-3, that:

> "The failure of an arresting officer to accord the individual arrested an opportunity to be chemically tested for the presence of alcohol in his blood in no way affects the validity of his arrest." (Appendix A, p. 10)

is nothing less than an arbitrary and stealthy encroachment upon petitioners' right under the Fourth Amendment to be free from unreasonable seizures of their persons and therefore, their arrests were unreasonable seizures under the Amendment.

II.

THE EXTRACTION OF BLOOD SAMPLES FROM PETITIONERS' BODIES, WITHOUT COMPLIANCE WITH THE INDIANA IMPLIED CONSENT STATUTE, WERE UNREASONABLE SEARCHES AND SEIZURES UNDER THE FOURTH AMENDMENT.

The Indiana Implied Consent Statute, relative to this question provides:

> (a) that any person who drives, operates or is in actual physical control of a motor vehicle on the public highways of the state shall be deemed to have given his consent to a chemical test for intoxication when asked by any law enforcement officer; (I. C. 9-4-4.5-1)
>
> (b) that a "chemical test" is an analysis by persons using such techniques and equipment as shall have been approved by the department of toxicology of the Indiana University School of Medicine of the breath, blood, urine or other bodily substance for the determination of the presence of alcohol or drugs or a combination of alcohol and drugs in such quantities as to constitute intoxication or "under the influence" as that term may be defined by statute; (I. C. 9-4-4.5-2(d))
>
> (c) that any law enforcement officer who has probable cause to believe that any person has committed the offense of driving or being in actual physical control of a vehicle while under the influence, in his presence or view, or who has probable cause to believe that any person who has been involved in a motor vehicle accident has committed such offense though not in his presence or view, shall not place such person under arrest for such offense until he has first offered to such person the opportunity to submit to a chemical test for intoxication to be administered by a person certified as a valid chemical test operator

> by the department of toxicology of the Indiana University School of Medicine; (I. C. 9-4-4.5-3)

Blood samples were extracted from petitioners' bodies, shortly after motor vehicle accidents. Petitioner, Smith, did not consent to the extraction from his body, in fact, he was not requested to make a consent, even though, as disclosed by the record, he was conscious at the hospital. The nurse who extracted the blood sample testified:

> "Well, he was coherent, co-operative, no slurring speech, concerned over the injured, very concerned over the man, of course, he was in pain and in shock from his injuries..." (Tr. p. 212)

The doctor who treated Smith at the hospital testified that his speech was not slurred and that he answered questions "forthrightly". (Tr. p. 201-202) Therefore, petitioner, Smith, was conscious, at least during part of the time during his treatment, although, he was never "offered the opportunity to submit to a 'chemical test' for intoxication to be performed by a person certified as a valid chemical test operator." Petitioner, Hummel, was conscious during his entire emergency hospital treatment, however, was never "offered the opportunity

to submit to a chemical test for intoxication to be performed by a person certified as a valid chemical test operator," rather, he was told that a sample of his blood was needed by the police and he said that it was alright. Although, Hummel's acquiescence could be construed to be a "consent" it could only be construed to be a "consent" or "submission" to a "chemical test for intoxication to be performed by a person certified as a valid chemical test operator", under Ind. Code 9-4-4.5-3. Of course, a search and seizure made upon the authority of a "consent", is strictly limited to the scope or limits of the consent and a search and seizure beyond the limits or scope of the search consent is unreasonable. Zap v. United States (1946) 328 U.S. 624, 90 L.Ed. 1477, 66 S. Ct. 1277. Consequently, Hummel's consent to a "chemical test" under Ind. Code 9-4-4.5-3, which he had already "impliedly consented" to by virtue of Ind. Code 9-4-4.5-1, could not be considered as authority for an extraction of a blood sample from his body by a nurse who was not certified as a valid chemical test operator, for the purpose of an analysis of the sample by a person also not certified as a valid chemical

test operator, using techniques and equipment, not approved.

The Indiana Court of Appeals held that the sample extracted from Smith was the product of an illegal search and seizure, because Smith was not under arrest and he had not consented to the extraction. However, the Court rejected Smith and Hummel's claim that the blood tests, i.e., the extraction and analysis of the blood samples, were the products of illegal searches and seizures, for the reason that the procedure and requirements of Ind. Code 9-4-4.5-3 was not followed. Petitioners in their Brief, filed in the Court of Appeals, argued:

"Since the procedure of I. C. 9-4-4.5-1 through 9-4-4.5-6 was not complied with with respect to the blood sample extracted from defendants' body, such extraction was an illegal search and seizure and could not have served as the basis of a probable cause determination." (Appellants' Brief p. 89)

Simply stated, petitioners urge that the extraction of the blood samples from their bodies and the analysis thereof, were unreasonable searches and seizures, for the reason that:

(1) The state officers totally failed to follow the statutory procedure prescribing the method and manner for obtaining such evidence; and

(2) With regard to petitioner, Hummel, his alleged consent to the extraction of a blood sample, if it was a consent, was limited to that proscribed by Ind. Code 9-4-4.5-3, consequently, the extraction and analysis which was made, was not within the limitations or scope of his consent.

Of course, the sample extracted from Smith was ruled to be the product of an illegal search and seizure, therefore, the second contention above, applies only to petitioner, Hummel.

As observed by the Indiana Court of Appeals, "the results of the blood tests cannot be viewed as a search and seizure incident to a lawful arrest within the meaning of Schmerber v. California ..." (Appendix A, p. 18) Therefore, if Hummel's contention, that the extraction from his body was not within the limitations or scope of his consent, then, regardless of the merit of his argument that the extraction was an unreasonable search and seizure because of the failure of the state to comply with the procedures and requirements of the Implied Consent Law, the extraction and analysis was nevertheless

an unreasonable search and seizure in violation of the Fourth Amendment.

In conclusion, as the blood samples and the results of their analysis were the products of illegal searches and seizures, such evidence could not be used as evidence in the probable cause for arrest determination, as the essence of a provision forbidding the acquisition of evidence in a certain way, e. g., by an unreasonable search and seizure, is that not merely evidence so acquired shall not be used before the court but that it shall not be used at all. Mr. Justice Holmes in Silverthrone Lumber Company v. United States (1919) 251 U.S. 385, 392, 64 L.Ed. 319, 321, 40 S.Ct. 182. Fahy v. State of Conn. (1963) 375 U.S. 85, 11 L.Ed. 2d 171, 84 S.Ct. 229.

III.

PETITIONERS' ARRESTS, BASED UPON EVIDENCE OBTAINED BY VIRTUE OF AN UNREASONABLE SEARCH AND SEIZURE, WAS AN UNREASONABLE SEIZURE OF THEIR PERSONS UNDER THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The Supreme Court has never passed upon the question here presented, consequently, there is limited authority available to petitioners in support of their contentions. Although, the Court, in Costello v. United

States (1956) 350 U.S. 359, 100 L.Ed. 397, 76 S.Ct. 406 and Rugendorf v. United States (1964) 376 U. S. 528, 11 L.Ed. 2d, 84 S.Ct. 825, has held that a probable cause determination, based in part on hearsay, was proper, the question presented here is of greater magnitude. The distinguishing characteristics between hearsay evidence and evidence obtained by way of an illegal search and seizure, hardly needs comment. An exclusionary rule prohibiting probable cause determinations, whether based in whole or in part, on evidence obtained by way of allegal searches and seizures, would impose no great burden upon the prosecution, who can always commence a new prosecution and submit an affidavit untainted with such illegally seized evidence, if possible, however, a defendant, on the other hand, is forced to face the jeopardy of serious criminal prosecution, which would affront any standard fairness and reasonableness.

Petitioners submit that a seizure of their persons (by arrest) is unreasonable when effectuated by a probable cause determination based in part on evidence illegally obtained.

The Indiana Court of Appeals held that, with regard to petitioner, Smith, "there

sufficient facts, independent of the blood test, to convince a neutral magistrate that probable cause existed for the arrest of Smith." (Appendix A, p. 20), rejecting petitioners' contention that their arrest, under such circumstances, was an unreasonable seizure of their persons under the Fourth Amendment.

The Court has adopted exclusinary rules, in other instances, where proceedings were tainted with illegally seized evidence. Nardone v. United States (1939) 308 U.S. 338, 84 L.Ed. 307; 60 S.Ct. 266; and Wong Sun v. United States (1963) 371 U.S. 471, 9 L.Ed. 2d 441, 83 S.Ct. 407; petitioners urge that similar action should be taken where probable cause affidavits are based, in whole or in part on evidence searched by way of an unreasonable search and seizure.

In conclusion, petitioners urge the Court to adopt a rule, providing that a probable cause determination based in whole or in part on evidence secured by an unreasonable search and seizure under the Fourth Amendment, is void and an arrest resulting therefrom is an unreasonable seizure under the Fourth Amendment.

IV.

THE PROBABLE CAUSE AFFIDAVITS, UPON WHICH WARRANTS WERE ISSUED FOR PETITIONERS' ARRESTS FAILED TO CONTAIN SUFFICIENT FACTS AND CIRCUMSTANCES FROM WHICH PROBABLE CAUSE FOR ARREST COULD BE DETERMINED, WHETHER THE RESULTS OF THE ILLEGALLY SEIZED BLOOD SAMPLES WERE OR WERE NOT CONSIDERED.

The Indiana Appellate Court ruled that, the probable cause affidavits, contained sufficient facts and circumstances from which probable cause could be determined, even independent of the result of the blood test, in the petitioner, Smith's case. Regarding the probable cause affidavit in petitioner, Hummel's case, the Court stated:

> "It is the opinion of this court that the magistrate being informed of the positive results of Hummel's blood test, coupled with the fact that Officer Kuhn stated under oath that he smelled liquor on Hummel's breath, probable cause existed for the arrest of Hummel and the trial court erred in dismissing the information charging Hummel with causing death while driving under the influence of liquor." (Appendix A, p. 19)

Regarding the probable cause affidavit in petitioner, Smith's, case, the Court stated:

> "However, a careful examination of the probable cause affidavit

> filed in Smith's case convinces this court that there were sufficient facts, independent of the blood test, to convince a neutral magistrate that probable cause existed for the arrest of Smith. Not only did Officer Jennings state under oath that he smelled liquor on Smith's breath, but facts outlining Smith's erratic pattern of driving were brought to the attention of the magistrate." (Appendix A, p. 20)

Regarding both affidavits, the Court observed:

> "Although the probable cause affidavits filed in the cases at bar are lacking somewhat in specificity, and certainly should not be considered as models for future use, it is the opinion of this court that sufficient information was contained therein to allow the magistrate to determine that probable cause existed for the arrests of Hummel and Smith, and the trial court therefore erred when it granted Hummel's and Smith's motions to dismiss." (Appendix A, p. 20)

For the reasons previously stated and argued, petitioner, Hummel, submits that extraction of the blood sample from his body was an unreasonable search and seizure under the Fourth Amendment, was inadmissible in the probable cause determination and should not have been considered therein. However, even considering the test result, the probable cause affidavit was patently

deficient, as was the probable cause affidavit pertaining to petitioner, Smith.

The probable cause affidavit in petitioner, Smith's, case stated:

> "The undersigned, being first duly sworn upon his oath, deposes and says:
>
> That he is a police officer for the City of Decatur, and did have occasion on the 12th day of September, 1974, to investigate an accident in the City of Decatur, wherein, the undersigned did determine from various witnesses and in the said investigation that the above named Defendant was driving an automobile and did pass a certain car on the right leaving the travelled portion of the roadway and did come back on said highway, and cross the centerline and crash into a car driven by Mark Allan Woodard, as a result of which accident, the said Mark Allan Woodard, did thereafter die.
>
> The undersigned further states that he did smell alcohol upon the breath of the above named Defendant and did procure a blood sample from said Defendant and said sample has subsequently revealed an alcoholic content in excess of the legal presumption of an intoxicated person under the Statute as charged herein.
>
> WHEREFORE, the undersigned prays that upon hearing held the Court issue a warrant for the arrest of the Defendant herein as charged in the information filed herewith;"

The probable cause affidavit in petitioner, Hummel's case stated:

> "The undersigned, being first duly sworn upon his oath, deposes and says:
>
> That he is a police officer for the Indiana State Police and did have occasion on the 16th day of September, 1974, to investigate an accident in Adams County, Indiana, wherein the undersigned did determine from various witnesses in said investigation that the above named Defendant was driving an automobile and did crash into the rear of a certain horse drawn buggy as alleged in the Affidavit filed herewith, as a result of which accident two persons, namely: Jonas E. Hilty and Pete E. Hilty, then and there died.
>
> The undersigned further states that he did smell alcohol upon the breath of the above named Defendant at the scene of said accident and did procure a blood sample from said Defendant and said sample has subsequently revealed alcoholic content in excess of the legal [p]resumption of an intoxicated person under the Statute as charged herein.
>
> WHEREFORE, the undersigned prays upon hearing held, the Court issue a warrant forthwith for the arrest of the Defendant herein."

Of course, the underlying principle, with regard to probable cause determinations, is that the determination must be made by a neutral and detached magistrate.

This Court in Aguilar v. Texas (1964 378 U.S. 108, 12 L.Ed. 2d 724, 84 S.Ct. 1509 stated:

> "Although the reviewing Court will pay substantial deference to judicial determinations of probable cause, the Court must still insist that the magistrate perform his 'neutral and detached' functions and not serve merely as a rubber stamp for the police." (378 U.S. 108 at 111, 12 L.Ed. 2d 723 at 727)

Further, regarding this requirement, as observed by this Court in United States v. Ventresca (1965) 380 U. S. 102 at 109, 13 L.Ed. 2d 684 at 689, 85 S.Ct. 741: "Recital of some of the underlying circumstances in the affidavit is essential if the magistrate is to perform his detached function and not serve merely as a rubber stamp for the police."

The second principle is that, while probable cause may rest upon evidence which is not legally competent at trial, e.g., hearsay evidence, Draper v. United States (1959) 358 U.S. 307, 3 L.Ed. 2d 327, 79 S.Ct. 329, and an affidavit need not reflect the direct personal observations of the affiant, the affidavit must inform the magistrate of some of the underlying circumstances supporting the affiants' conclusions and his belief that the party

supplying the information was credible. Aguilar v. Texas, supra.

As result of the decisions of this Court, the Indiana Legislature enacted a statute setting forth requirements of probable cause affidavits, when not based upon the affiant's personal knowledge, this statute provides that when probable cause is based on credible hearsay, the affidavit must contain:

> (a) Affirmative allegations that the credible person spoke with personal knowledge of the matters contained therein;
>
> (b) The facts within the personal knowledge of the credible person; and
>
> (c) The facts within the affiants' knowledge as to the credibility of the credible person. (Ind. Code 35-1-6-2)

The Third principle which goes to the very definition of "probable cause", is that a probable cause determination requires more than even "strong reason to suspect". In this regard, this Court in Henry v. United States (1959) 361 U.S. 98, 80 S.Ct. 168, 4 L.Ed. 2d 134 stated:

> "And as the early American decisions both before and immediately after its adoption (the fourth amendment) show, common rumor or report, suspicion,

> or even 'strong reason to suspect' was not adequate to support a warrant for arrest. And this principle has survived to this day ... It was against this background that two scholars recently wrote, "Arrest on mere suspicion collides violently with the basic human right of liberty." (361 U.S. 98 at 101, 4 L.Ed. 2d 134 at 138)
>
> "Under our system suspicion is not enough for an officer to lay hands on a citizen. It is better, so the Fourth Amendment teaches, that the guilty sometimes go free than that citizens be subject to easy arrest." (351 U. S. 98 at 102, 4 L.Ed. 2d 134 at 139, 140)

See Also: Mallory v. United States (1957) 354 U. S. 449, 1 L. Ed. 2d 1479, 77 S.Ct. 1356; Wong Sun v. United States (1963) 371 U. S. 471, 9 L.Ed. 2d 441, 83 S.Ct. 407.

Before discussing the particular deficiencies of the probable cause affidavits at issue here, the instant cases should be distinguished from the case of Schmerber v. California, supra. In Schmerber, the petitioner was arrested at a hospital following an automobile accident. The arrest was warrantless, the probable cause determination having been made by a police officer investigating the accident. The officer's probable cause was based upon his observations that he smelled liquor on

petitioner's breath and "that petitioner's eyes were 'bloodshot, watery, sort of glassy appearance'" and "similar symptoms of drunkenness". (384 U. S. 757 at 769, 16 L.Ed. 2d 908 at 918, 919) In these cases, petitioners were not arrested at the accident scenes nor at the hospitals where they were removed after the accidents, rather, Smith was not arrested until eight days later and Hummel sixteen days later, both on arrest warrants. Further, the trial court found that there was not probable cause for the respective investigating police officers to believe that petitioners had committed the offense of driving while under the influence of intoxicating liquor (Appendix D and E), therefore, the extractions of the blood samples were illegal searches and seizures and the results should not have been considered in its probable cause determination. Although, the State, in its appeal, alleged that such ruling was erroneous, the Indiana Court of Appeals did not address itself to this question.

In any event, the probable cause for arrest was not made by the police officers, rather was made by the trial court, based solely upon the content of the probable cause affidavits. It should be noted that

Ind. Code 9-4-1-134 provides for an exception to the warrant requirement and provides that a police officer can arrest a person for the offense of driving a motor vehicle while under the influence of intoxicating liquor if he has probable cause to believe that the offense has been committed when coupled with an accident. Therefore, if the investigating officers had probable cause, it would have been their duty to place petitioners under arrest, as they were involved in accidents, of course, before any such arrest they would have had to have offered petitioners the opportunity to submit to a chemical test pursuant to the provisions of the Indiana Implied Consent Law. (Ind. Code 9-4-4.5-3)

Therefore, these cases, while similar in some respects to Schmerber, are very different in others. There are, of course, some aspects of the Schmerber decision which should be recalled here, for instance, the Court stated in conclusion:

> "The integrity of an individual's person is a cherished value of our society. That we today hold that the Constitution does not forbid the State's minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions." (384 U.S. 757 at 772, 16 L.Ed. 2d 908 at 920)

Petitioners strongly urge that the circumstances of the intrusions into petitioners' bodies clearly come within the above limitation and should be forbidden. For reasons previously stated, petitioners urge that the extractions of blood from their bodies were searches and seizures within the proscription of the Fourth Amendment and therefore should not be considered in the review of the probable cause affidavits in making probable cause determinations.

In sum and substance, the probable cause affidavits presented here substantively state only the "conclusions" of the affiant and very few of those. The affidavit in Smith's case only contains one personal observation of the affiant, i. e., that he smelled alcohol on petitioners' breath. The remainder of the affidavit states only the conclusions of the affiant and hearsay information supplied to him by unknown persons. The affiant's conclusions that Smith was the driver of the vehicle and drove it in the manner described was obviously based upon what someone had told him or what he speculated. The so-called witness may have been persons who arrived after the accident had occurred, and consequently could not have spoken upon personal observations. Whether Smith was the driver

of the car and whether he drove in the manner described, were crucial questions. Undoubtedly, the officer's conclusions that Smith was the driver and that he had driven in the manner described, were based upon hearsay information. From the affidavit it cannot be determined whether the hearsay was first-hand or totem pole hearsay, hearsay of the rankest and most unreliable type.

This Court in Aguilar v. Texas, supra, held that some of the underlying circumstances, from which the hearsay asserter made his conclusions as to the existance of the facts supplied to the affiant, must be stated, so that the examining magistrate himself can determine whether there was a reasonable basis for the asserters conclusions. Second, it was held that, while the asserter's indentity need not be disclosed, the affidavit must state some of the underlying circumstances from which the affiant concluded that the hearsay asserter was "credible" or his information "reliable". (378 U.S. 108 at 115, 12 L.Ed. 2d 724 at 729) Although, the Aguilar case involved the question of probable cause for a search warrant, its principles and teachings are no less applicable here.

A third allegation of fact, based upon hearsay, was the alleged result of the blood test. Not only is it not disclosed who made the analysis, i. e., a chemist, a labratory technician, a trained police officer, an untrained police officer or a person having no technical training or experience. While, as observed in Schmerber, "extraction of blood samples for testing is a highly effective means of determining the degree to which a person is under the influence of alcohol" (384 U.S. 757 at 771, 16 L.Ed. 2d 908 at 920) the procedure is no more effective than the technical ability of the persons extracting the blood and performing the actual analysis. Again, the requirements enunciated in Anguilar, supra, are totally lacking,it was the affiant's conclusion that the extraction and analysis were made in an acceptable and reliable manner. Finally, whose conclusion was it that the result of the blood analysis "revealed an alcoholic content in excess of the legal presumption"? If the test result was admissible, the failure to state what the result was, leaving the determination of the legal effect of such to the reviewing magistrate, was patent error. The affiant may or may not have been correct in his

interpretation of the legal significance of the test result.

The probable cause affidavit makes it "expressly" clear that the "determination" of the basic facts were made by the affiant and not by the trial court. In this regard the affidavit states: "the undersigned did determine from various witnesses and in the said investigation ..." Therefore, the trial court was required to accept the affiant's conclusion and determination, and there were no other facts and circumstances disclosed from which the trial court could have itself determined that the affiant's determinations and conclusions were supported by credible and reliable facts and information. Further, from reading the affidavit, it was left to the trial court, reviewing the affidavit, to conclude that it was Smith's erratic driving which caused his car to leave the road, cross the centerline and crash into the other vehicle. This the Court was required to determine on pure speculation, as Smith's car could have left the road and crossed the centerline for a number of reasons. It would have been equally possible for the court to conclude that Smith was trying to avoid hitting another car stopped in front of him, that such was not due to

any fault on his part or that he was merely negligent. Finally, the allegation that the other driver's death was the "result" of the accident, again, was simply a conclusion of the affiant. Did some doctor describe the decedent's injuries to the affiant and tell him that death was the result of those injuries?

The affidavit in Hummel's case is even less sufficient, as there is no description of the manner of driving whatsoever. Again, the affiant states: "the undersigned did determine from various witnesses in said investigation "that Hummel was the driver of the vehicle. Otherwise, the same deficiencies described above with regard to the affidavit involving Smith, appear in the affidavit regarding Hummel and need no further discussion here, the affidavit is deficient and defective for the same reasons.

With regard to both affidavits, how strong was the alleged smell of alcohol, strong or slight? The trial court reviewing the affidavits, no doubt speculated that the odor was strong but upon what basis? Finally, what offense allegedly occurred for which a warrant was to issue? The affidavits do not allege any specific offense and certainly could not be added

to or explained by way of parol evidence or anything outside the affidavits. The court could equally speculate that any number of offenses occurred.

Petitioners submit that the opinion of the Indiana Court of Appeals erred in its determination that the trial court erred in its determination that these probable cause affidavits failed to contain a sufficient statement of facts and circumstances from which it could determine probable cause for petitioners' arrest, and therefore, petitioners' arrests were unreasonable seizures of their persons under the Fourth Amendment.

While this Court, or any Court, in judging probable cause is not to be confined by niggardly limitations, or by restrictions on the use of common sense, U. S. v. Ventresca, supra, on the other hand, neither should it indulge in making assumptions, conjectures or speculations.

Finally, weighing the utility of requiring the State of Indiana to commence a new prosecution against these petitioners by way of filing proper probable cause affidavits is far outweighed by the alternative of subjecting these petitioners to the jeopardy of serious prosecution upon the basis of the probable cause affidavits

present here.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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"APPENDIX A"

IN THE

COURT OF APPEALS OF INDIANA

FIRST DISTRICT

STATE OF INDIANA, Appellant (Plaintiff Below),	)
-vs-	) No. 2-875 A 209
CLAYTON L. HUMMEL, JOSEPH D. SMITH, Appellees (Defendants Below).	)

APPEAL FROM THE ADAMS CIRCUIT COURT
The Honorable Myles F. Parrish, Judge

LOWDERMILK, J.

NATURE OF THE CASE

This case was transferred to this office from the Second District in order to help eliminate the disparity in caseloads among the Districts.

Plaintiff-appellant, State of Indiana (State), has perfected this appeal following the dismissal of two informations charging defendants-appellees, Clayton L. Hummel (Hummel), and Joseph D. Smith (Smith) [1/] with causing the death of another while driving under the influence of intoxicating liquor.[2/]

1/ These two cases were ordered consolidated pursuant to Ind. Rules of Procedure, Appellate Rule 5(B).

FACTS

HUMMEL CASE:

At approximately 11:45 p. m., on September 16, 1974, Hummel was driving his automobile between 60-70 m.p.h. down State Road 27, Adams County, Indiana. Hummel, struck from the rear, a horse and buggy occupied by the Hilty family resulting in the death of their two children.

Trooper William Kuhn of the Indiana State Police investigated the accident. Trooper Kuhn, while administering first aid, noticed an odor of alcohol on Hummel's breath. Trooper Kuhn testified that he observed Hummel walking in a meandering fashion, he had blood shot eyes, and he talked with "thick speech".

Hummel was taken by ambulance to the hospital. While at the hospital, a nurse at the request of the police, took a blood sample from Hummel. Hummel consented to the sample being taken. An analysis of the sample indicated that Hummel was presumably driving while under the influence of intoxicating liquor. However, neither the technician nor the equipment

2/ Ind. Code 9-4-1-54(b)(1).

had been certified by the Indiana University School of Medicine - Department of Toxicology.

On September 24, 1974, a warrant was issued for the arrest of Hummel based upon a probable cause affidavit executed by Kuhn.

SMITH CASE:

On September 12, 1974, at approximately 11:30 p. m., Smith, while traveling south on State Road 27, Adams County, Indiana, collided with a vehicle being driven by Mark Allen Woodard. Mr. Woodard died as a result of the collision.

James Rich, an eyewitness to the accident, testified that while driving south on State Road 27 a vehicle passed him on the right-hand side of the road, went into a ditch, came out of the ditch cutting back in front of him, and then crossed over into the left-hand side of the road thereupon colliding with the vehicle being driven by Woodard.

Decatur Police Officer Kenneth Jennings investigated the accident. He testified that he observed five beer cans either in or near Smith's automobile. Only one had been opened prior to the accident.

Smith was taken to the hospital where a sample of his blood was extracted and analyzed. The results showed that Smith

was presumably driving while under the influence of intoxicating liquor. However, neither the technician nor the equipment used to conduct the test had been certified by the Indiana University School of Medicine - Department of Toxicology.

On September 20, 1974, a warrant was issued for the arrest of Smith based upon a probable cause affidavit executed by Jennings, which resulted in the arrest of Smith on September 25, 1974.

ISSUES

1. Whether the Indiana Implied Consent Law, Ind. Code 9-4-4.5-1 - 9-4-4.5-6, superseded in part Ind. Code 9-4-1-134. 3/

2. Whether Hummel or Smith was under arrest prior to the service of the arrest warrants.

3. Whether the State's affidavits of probable cause were sufficient to allow a magistrate to reasonably determine that a crime had been committed.

DISCUSSION AND DECISION

ISSUE ONE

The State contends that the trial court erred in holding that Ind. Code 9-4-1-134 was superseded in party by Ind. Code 9-4-4.5-3. We agree.

3/ All references to the Indiana Code are to the 1976 Ed.

I. C. 9-4-1-134 provides as follows:

"Arrest for violations.- A peace officer may, without a warrant, arrest a person, in case of violations of section 39[9-4-1-40] of this act and section 52(b) [subsection (b) of 9-4-1-54] of this act if the violation of said section 52(b) [subsection (b) of 9-4-1-54] is coupled with accident which in fact has been committed, though not in his presence, when he has reasonable cause to believe that the violation was committed by such person. The procedure prescribed herein shall not be exclusive of any other method prescribed by law for the arrest and prosecution of a person for an offense of like grade. [Acts 1939, ch. 48, § 166, p. 289; 1951, ch. 221, § 1, p. 637.]"

Ind. Code 9-4-1-54(b)(1) provides in pertinent part:

"(b) Operating or driving while under the influence of intoxicating liquor or narcotic or other drugs. Any person who operates or drives a vehicle while that person is under the influence of intoxicating liquor or unlawfully under the influence of narcotic or other habit forming or dangerous depressent or stimulant drugs shall be guilty of a criminal offense.

(1) Any person who while under the influence of intoxicating liquor or unlawfully under the influence of narcotic or other habit forming or dangerous, depressant or stimulant drugs operates or drives a vehicle and when so operating or driving causes the death of another person, is guilty of a felony and, upon conviction, shall be imprisoned

for a determinate period of not less than one (1) year nor more than five (5) years; or shall be imprisoned for a determinate period of not less than one (1) year nor more than two (2) years to which shall be added a fine of not less than two hundred fifty dollars ($250) nor more than five thousand dollars ($5,000). Upon conviction, the court shall recommend the suspension of the current driving license of the person so convicted for a period of one (1) year and the commissioner of motor vehicles shall comply with the recommendations, and should the court fail to make the mandatory recommendation, or should the court fail to make the appropriate mandatory recommendation, the commissioner shall proceed to act in the matter as if such recommendation had been made by the court. During the three (3) years following the termination of the suspension, the commissioner may not issue a license to that person unless that person provides and maintains proof of financial responsibility in force pursuant to IC 9-2-1 (9-2-1-1 - 9-2-1-45)."

Ind. Code 9-4-4.5-3 provides:

"Opportunity to submit to chemical test prior to arrest.-Any law enforcement officer authorized to enforce the laws of this state regulating the use and operation of vehicles on public highways who has probable cause to believe that any person has committed the offense of driving or being in actual physical control of a vehicle while under the influence, in his presence or view, or who has <u>probable cause to believe that any person who has been involved in a</u>

motor vehicle accident has commited (committed) such offense, though not in his presence or view, shall not place such person under arrest for such offense until he has first offered to such person the opportunity to submit to a chemical test for intoxication to be administered by a person certified as a valid chemical test operator by the department of toxicology of the Indiana University School of Medicine. Any such person who agrees to submit to such chemical test for intoxication shall not be arrested for driving while under the influence, but shall accompany the officer to the nearest available chemical test device for the purpose of taking such test as a condition of the driving privilege, (a) If such chemical test results in prima facie evidence that such person is not under the influence, he shall not be arrested and charged with such offense and he shall be released immediately." (Our emphasis)

It is the opinion of this court that IC 9-4-1-134 which allows a police officer to arrest a person who he has probable cause to believe has violated IC 9-4-1-54(b)(1), supra, was not superseded by IC 9-4-4.5-3, supra. The trial court was of the opinion that before an arrest for a violation of IC 9-4-1-54(b) could be lawful, it was necessary for the arresting officer to first accord the arrestee an opportunity to submit to a chemical test to discover the extent, if any, of the driver's intoxication.

Ind. Code 9-4-4.5-4 provides in pertinent part as follows:

"Refusal to submit.-Judicial hearing prior to arraignment - Matters to be determined - Findings. - When a certification of refusal to submit to a chemical test is submitted to the court, it shall hold a separate hearing on the matter of the test refusal, prior to the arraignment on the criminal charge, for the determination of the following matters:

(a) Did the law enforcement officer have probable cause to believe that the accused had committed the offense of driving or being in actual physical control of a vehicle while under the influence?...

(b) Did the law enforcement officer offer to the accused the opportunity to submit to a chemical test for intoxication before placing the accused under arrest for such offense, and was the accused physically and mentally able to provide a breath sample?...

(c) The defendant shall be entitled to reasonable written notice of the separate hearing and shall have the right to attend the hearing in person, with or without legal counsel, and to present evidence. The defendant shall also be entitled to examine or cross-examine a witness who presents evidence at the separate hearing. After the issues in (a) and (b) above are determined, the court shall then determine whether or not the accused did in fact refuse to submit to a chemical test for intoxication.

"If the court finds that a refusal to submit to a chemical test for intoxication was because of mental or physical incapacity not related to intoxication, such refusal and the reasons therefor shall be reported to the commissioner of motor vehicles for such action as shall be deemed proper by him on the form provided by the commissioner. If the court finds that the mental or physical incapacity would affect the driving ability of the accused, it shall forward such finding to the commissioner of motor vehicles along with the current driving license of the accused, otherwise, the driving license shall be returned to the accused.

"If the court finds that such refusal was made wilfully and knowingly or because of the state of intoxication of the accused, it shall forward such finding to the commissioner of motor vehicles on a form to be provided by the commissioner, along with the current driving license of the accused, and it shall recommend to the commissioner that the driving privileges of the accused remain suspended for a period of one (1) year from the date of said finding, and the commissioner shall comply with said recommendation.

"If the court finds that the accused did not refuse to submit to a chemical test for intoxication or if the court finds that the law enforcement officer did not properly proceed under this chapter, no further action shall be taken under this chapter (9-4-4.5-1 - 9-4-4.5-6), and the court shall proceed with the arraignment, unless the finding

includes one lack of probable cause, in which case the charge of driving or being in actual physical control of a vehicle while under the influence shall be quashed upon the motion of the court. (IC 1971, 9-4-4.5-4, as added by Acts 1971, P.L. 130, § 1, p. 557; 1974, P.L. 38, § 1, p. 165.)" (Our Emphasis)

The failure of an arresting officer to accord the individual arrested an opportunity to be chemically tested for the presence of alcohol in his blood in no way affects the validity of his arrest. The only effect of the arresting officer's failure to provide the arrestee with the chemical test provided for in the Implied Consent Statute would be that the person arrested could not have his driver's license suspended for a period of one year prior to trial. This is made clear by that portion of IC 9-4-4.5-4, supra, which provides:

"* * *

If the court finds that the accused did not refuse to submit to a chemical test for intoxication or if the court finds that the law enforcement officer did not properly proceed under this chapter (9-4-4.5-1 - 9-4-4.5-6), no further action shall be taken under this chapter, and the court shall proceed with the arraignment, unless the finding includes one lack of probable cause, in which case the charge of driving or being in actual physical control of a vehicle while under the influence

shall be quashed upon the motion of the court ..." (Our emphasis)

Therefore, this court is of the opinion that the trial court erred in holding that IC 9-4-4.5-3, supra, superseded IC 9-4-1-134, supra.

ISSUE TWO

The State contends that the trial court erred in holding that neither Hummel nor Smith were arrested at the scene of their respective accidents. We disagree.

In the case of Dillon v. State (1971), 256 Ind. 412, 275 N.E. 2d 312, our Supreme Court at p. 315 discussed the nature of an arrest as follows:

> "... Burns' Ind. Stat. Ann., Sec. 9-1004, IC 1971, 35-1-17-1, defines an arrest in the following manner:
>
> "'Arrest' defined.-Arrest is the taking of a person into custody, that he may be held to answer for a public offense. (Acts 1905, Ch. 169, § 120 p. 584.)"
>
> "Burns' Ind. Stat. Ann., Sec. 9-1005, IC 1971, 35-1-19-1, provides that an arrest is made in the following manner.
>
> "'Arrest - How made.-An arrest is made by an actual restraint of the person of the defendant, or by his submission to the custody of the officer, but the defendant shall not be subject to any more restraint than is necessary for his arrest and detention. (Acts 1905, Ch. 169, § 127, p. 584).'

> "There is no question, under the circumstances, of the instant case as to whether the appellant was in fact under the arrest at the time he emptied his pockets in the police station. Failure to inform a defendant that he is 'under arrest' does not in every case mean that he was not in fact placed under arrest. In Pullins v. State (1970), Ind., 256 N. E. 2d 553, regarding the necessity of informing a defendant he is 'under arrest' we made this observation:
>
> "' The obvious purpose of informing a suspect he is under arrest is not to make the arrest legal but to indicate to the person being arrested that his detention is legal, so he will not resist. In Plummer v. State (1893), 135 Ind. 308, 34 N.E. 968, the town marshal, attempting to arrest the defendant without a warrant, failed to inform the defendant of his intention, but simply attacked him. We held that under these circumstances the defendant could exercise his right to defend himself, the same as against any unprovoked attack. Here no force was employed. The reason for informing appellant he was under arrest was not present. We further note that the fact of intent to arrest may be shown by surrounding facts and circumstances. Here a verbal statement of an intent to arrest would have been an idle ceremony.' (256 N.E. 2d 556)"

Applying the definition of an arrest, supra, to the facts of the cases at bar, it is the opinion of this court that the trial court did not err in determining

that neither Hummel nor Smith were arrested at the scene of their respective accidents.

In Hummel's case the facts most favorable to the judgment of the trial court reveal the following: Hummel was not informed that he was under arrest; he was not guarded at the scene of the accident or at the hospital; he was released from the hospital and proceeded back to work until he was subsequently arrested pursuant to a formal arrest warrant. In short, Hummel was never directly informed by word, or indirectly informed by act, that he was under arrest prior to the execution and service of the formal arrest warrant. The unmanifested intention of a police officer to place an individual under arrest is not sufficient to perfect the arrest.

The facts leading up to the formal arrest of Smith parrot those which have been stated above in connection with Hummel's formal arrest and will not be restated here.

There being evidence from which the trial court could have reasonably concluded that the liberty of neither Hummel nor Smith was restrained prior to their arrests pursuant to the formally executed arrest warrants, and there being no manifestation of intent conveyed to either Hummel or

Smith prior to their arrests under the warrants, this court is unable to hold as a matter of law that the trial court erred in finding that Hummel and Smith were not subjected to warrantless arrests at the scenes of their respective automobile collisions.

ISSUE THREE

The State contends that the trial court erred in its determination that the probable cause affidavits executed by the authorities were insufficient to allow a neutral magistrate to determine that probable cause existed for the issuance of warrants for the arrests of Hummel and Smith. We agree.

In Hummel's case a probable cause affidavit was executed on September 26, 1974, which provided as follows:

> "The undersigned, being first duly sworn upon his oath, deposes and says:
>
> That he is a police officer for the Indiana State Police and did have occasion on the 16th day of September, 1974, to investigate an accident in Adams County, Indiana, wherein the undersigned did determine from various witnesses in said investigation that the above named Defendant was driving an automobile and did crash into the rear of a certain horse drawn buggy as alleged in the Affidavit filed herewith, as

a result of which accident two persons, namely, Jonas E. Hilty and Pete E. Hilty, then and there died.

The undersigned further states that he did smell alcohol upon the breath of the above named Defendant at the scene of said accident and did procure a blood sample from said Defendant and said sample has subsequently revealed alcoholic content in excess of the legal [p]resumption of an intoxicated person under the Statute as charged herein.

WHEREFORE, the undersigned prays upon hearing held, the Court issue a warrant forthwith for the arrest of the Defendant herein."

In Smith's case a probable cause affidavit was executed on September 20, 1974, which provided as follows:

"The undersigned, being first duly sworn upon his oath, deposes and says:

That he is a police officer for the City of Decatur, and did have occasion on the 12th day of September, 1974, to investigate an accident in the City of Decatur, wherein, the undersigned did determine from various witnesses and in the said investigation that the above named Defendant was driving an automobile and did pass a certain car on the right leaving the travelled portion of the roadway and did come back on said highway, and cross the center-line and crash into a car driven by Mark Allan Woodard, as a result of which accident the said Mark Allan Woodard did thereafter die.

The undersigned further states that he did smell alcohol upon the breath of the above named Defendant and did procure a blood sample from said Defendant and said sample has subsequently revealed an alcoholic content in excess of the legal presumption of an intoxicated person under the Statute as charged herein.

WHEREFORE, the undersigned prays that upon hearing held the Court issue a warrant for the arrest of the Defendant herein as charged in the Information filed herewith."

Hummel and Smith contend that the affidavits were insufficient because based in part on the results of an illegal search and seizure, and in part on the conclusions of the affiant thereby failing to relate sufficient facts to the magistrate to enable him to make a meaningful determination of probable cause.

At the outset we reject Hummel's and Smith's contention that the blood tests could not properly be considered by the magistrate solely because the arresting officers did not comply with the Implied Consent Statute by first offering Hummel and Smith the opportunity to take a blood test before being placed under arrest, and because the equipment and test operator were not properly certified.

Ind. Code 9-4-4.5-6 provides in pertinent part as follows:

"Chemical test operators - Selection, training and certification - Inspection of chemical devices - Certificates of inspection exception to hearsay rule.-The director of the state department of toxicology of the Indiana University School of Medicine is hereby authorized and empowered to adopt the necessary rules and regulations to set standards for the selection, training, certification and recertification of chemical test operators and to provide for the periodic inspection of chemical test devices. No chemical test for intoxication shall be considered as evidence for the purpose of this chapter (9-4-4.5-1 - 9-4-4.5-6) if it is not performed by a person certified as a valid operator by the state department of toxicology of the Indiana University School of Medicine, and no equipment or chemicals shall be used for such chemical tests which has not been inspected and approved under the rules and regulations adopted by the department ..." (Our emphasis)

Therefore, since the probable cause affidavits were not used for the purpose of implementing the mandates of the Implied Consent Statute, i. e., the revocation of driving privileges for a period of one year, the trial court erred in not considering the results of the blood tests for the reasons argued by Hummel and Smith.

We emphasize that what we have said above should not be construed as a judicial seal of approval for the extraction of a

blood specimen, testing it, and subsequently using it to obtain an arrest warrant or as evidence to obtain a conviction at trial under any and all circumstances as pointed out, infra.

We have heretofore determined that this court cannot hold as a matter of law that the trial court committed error when it found that neither Hummel nor Smith was arrested without a warrant at the scenes of their respective collisions. Therefore, the results of the blood tests cannot be viewed as a search and seizure incident to a lawful arrest within the meaning of Schmerber v. California (1966), 384 U. S. 757, 86 S.Ct. 1826, 16 L. ED. 2d 908.

It is axiomatic that the fruits of an unlawful search and seizure cannot be subsequently utilized to serve as the foundation for the issuance of an arrest warrant. Therefore, the scope of our inquiry becomes narrowed to this question - Was the seizure of blood from either Hummel or Smith unlawful?

In the case of Hummel, although the blood was extracted for analysis prior to his arrest, it is the opinion of this court that the results of the blood test could have been considered by the magistrate in determining the existence of probable cause to issue

a warrant for his arrest. The reason for our holding is that the record discloses that Hummel, upon being informed that the police desired a blood test, consented thereto. Hummel, having consented to his blood being extracted for a test, is now in no position to complain that the results proved positive and were used in part to obtain a warrant for his arrest.

It is the opinion of this court that the magistrate being informed of the positive results of Hummel's blood test, coupled with the fact that Officer Kuhn stated under oath that he smelled liquor on Hummel's breath, probable cause existed for the arrest of Hummel and the trial court erred in dismissing the information charging Hummel with causing death while driving under the influence of liquor.

In the case of Smith the record paints a different picture. It appears that Smith was unconscious and therefore oblivious to fact that a sample of his blood was taken for testing. Such being the case, and having already determined that the trial court was justified in concluding that Smith was not under arrest prior to being served with an arrest warrant, we are confronted with the situation where

illegally seized evidence is sought to be utilized to justify the issuance of a subsequent arrest warrant. There being no exigent circumstance such as Hummel's consent in the case at bar, the trial court properly recognized that the magistrate could not base his determination of probable cause upon an affidavit which listed facts which were discovered as a result of unconstitutional police tactics.

However, a careful examination of the probable cause affidavit filed in Smith's case convinces this court that there were sufficient facts, independent of the blood test, to convince a neutral magistrate that probable cause existed for the arrest of Smith. Not only did Officer Jennings state under oath that he smelled liquor on Smith's breath, but facts outlining Smith's erratic pattern of driving were brought to the attention of the magistrate. Although the probable cause affidavits filed in the cases at bar are lacking somewhat in specificity, and certainly should not be considered as models for future use, it is the opinion of this court that sufficient information was contained therein to allow the magistrate to determine that probable cause existed for the arrests of Hummel and Smith, and the trial court therefore erred

when it granted Hummel's and Smith's motions to dismiss.

Reversed and remanded for further proceedings not inconsistent with this opinion.

ROBERTSON, C. J. and
LYBROOK, J. CONCUR.

"APPENDIX B"

STATE OF INDIANA
COUNTY OF ADAMS, SS:
STATE OF INDIANA
VS.
JOSEPH D. SMITH

IN THE ADAMS CIRCUIT COURT
JANUARY SESSION, 1975 TERM
CAUSE NO. 4438
RULING ON MOTION TO DISMISS
AND
SPECIAL FINDINGS OF FACT

Comes now the State of Indiana by Daniel C. Burry, Prosecuting Attorney of the 26th Judicial Circuit; comes now the defendant, Joseph D. Smith, in person, and by his counsel, Joseph M. Johnson, and the motion to dismiss, heretofore filed on December 9, 1974, having been heretofore submitted to this Court for hearing and determination on January 3, 1975, and evidence having been submitted in part, but not concluded, and further evidence was submitted and concluded on January 10, 1975, and the Court now having requested the parties herein to submit briefs on or before January 30, 1975, and both the State of Indiana and the defendant now having submitted their briefs on January 30, 1975,

and the defendant, Joseph D. Smith, having filed a response to the State's brief and motion to strike, and the Court having heard the evidence and argument of counsel, and having seen and inspected said briefs, and being sufficiently advised in the premises, now finds as follows, to-wit:

1. That the defendant herein was charged by an information on the 20th day of September, 1974, with the crime of driving while under the influence of intoxicating liquor, causing the death of another.

2. That on or about the 12th day of September, 1974, the defendant was alleged to have been involved in a motor vehicle accident, and a sample of blood was extracted from his body immediately following the accident at the request of Officer Kenneth Jennings of the City of Decatur, Indiana Police Department.

3. The Court further finds that the blood sample extracted from the defendant's body was extracted by Nurse Lois Sharp on duty in the emergency room of the Adams County Memorial Hospital where the defendant was taken immediately after the accident.

4. The Court further finds that the defendant remained in the Adams County Memorial Hospital for a period of a few days and was later released.

5. The Court further finds that Nurse Lois Sharp, who was on duty in the emergency room of the Adams County Memorial Hospital, and who extracted the blood from the defendant's body is a person not certified as a valid chemical test operator by the Department of Toxicology of the Indiana University School of Medicine.

6. The Court further finds that the said defendant herein was transported from the scene of the accident to the Adams County Memorial Hospital by Richard Linn and David S. Haggard.

7. The Court further finds that the defendant herein was found in the rear seat of the automobile, which automobile was involved with another, in which the driver of the other automobile died, not at the scene of the accident, but approximately four hours later.

8. The Court further finds that Kenneth Jennings of the Decatur Police Department, who investigated said accident, smelled an odor of alcohol, either on the defendant or from the defendant's breath, and that one open beer can was found in the car and sever beer cans were smashed, but not open.

9. The Court further finds that Robert Noack of the City of Decatur Police Department testified that the defendant was real

coherent, however other people who witnessed the defendant herein, to-wit: Richard Linn and David S. Haggard, the ambulance drivers, and Doctor James Burk, Nurse Ruth Winnes, and Nurse Lois Sharp, testified that they could smell no alcoholic odor on the defendant, while in the hospital.

The Court does not intend to encompass all of the evidence given in this case, and does not limit its findings merely on the facts elicited in this ruling, but the Court bases its findings upon all the evidence that was given, this being only a small portion of it, but perhaps some of the most important parts.

I.

The first question the Court must decide is whether or not the defendant was arrested at the scene of the accident, or in the Adams County Memorial Hospital without a warrant.

The Indiana Supreme Court in the recent case of

Dillon v. State (1971)
275 NE 2nd 312, 315

defines an arrest: "Arrest defined -- Arrest is the taking of a person into custody, that he may be held to answer for a public offense", and the Supreme Court has stated further: "Arrest -- now made: An arrest is made by an actual restraint of the person of the defendant, or by his submission to the custody of the officer, but the defendant shall not be subjected to any more restraint than is necessary for his arrest and detention".

A further definition of arrest is found in

4 Am Jur, Arrest, Section 2

"Arrest is the taking, seizing, or detaining of the person of another, either by touching, or putting hands on him, or by any act which indicates detention, to take him into custody and subjects the person arrested to the actual control and will of

the person making the arrest. The act relied upon as constituting an arrest must have been performed with the intent to effect an arrest and must have been so understood by the party arrested".

SEE ALSO: Dixon vs. Shiner
163 NW 2nd 481, 485

It has also been held in

5 Am Jur 2nd, Arrest,
Section 75, page 761

"It is the duty of an officer who has arrested a person to keep him safely, until it is possible to deliver him before a magistrate."

Burns Indiana Statutes 9-4-1-130 (47-2307) provides:

"That when a person is arrested and charged with an offense or causing, or contributing to an accident resulting in injury or death to any person, or when such person is arrested on a charge of driving under the influence of intoxicating liquors, shall be immediately taken before a magistrate."

It is clear from this evidence that under these decisions the defendant was not arrested without a warrant.

II.

The Court must determine whether or not the Implied Consent Statute 9-4-4.5-3 (47-2003e) of the 1971 General Assembly which

provides that a law enforcement officer shall not place a person under arrest for the offense of driving under the influence, until the person is first offered the opportunity to submit to a chemical test for intoxication ... has repealed in part 9-4-1-134 (47-2310) by implication, which statute is a 1939 Act as amended in 1951, which provides that a peace officer may, without a warrant arrest a person in case of violation of 9-4-1-40 (47-1910) commonly referred to as the leaving the scene of an accident involving death or injuries to persons and property and (9-4-1-54) subsection (b) which is commonly referred to as Driving Under the Influence Statute, if the violation is coupled with an accident, which in fact has been committed, though not in the officer's presence, when he has reasonable cause to believe that the violation was committed by such person.

(1) The sentence containing the words "shall not place the person under arrest" is mandatory and not discretionary as the word "may" implies.

SEE: The word "shall" used in the Statute is presumed to have been used in the imperative sense.

Board of Finance of School City of
Aurora vs. Peoples National Bank
44 App 578; 89 NE 904

(2) It is the rule of law that when a number of Statutes, no matter when passed, relate to the same thing, or general subject matter, they are to be construed together, so that all may be given effect and produce a harmonious system, are in pari materia, and it is also presumed that new laws are enacted with reference to existing laws.

Pittsburgh C.,C. & St. L.R. Co., vs
Home Insurance Co.,
73 App 226; 125 NE 427

Brownsburg vs. Trucksess
98 App 322; 185 NE 315

(3) The Legislature is presumed to be acquainted with existing law, and in legislating on any subject, to have in view its provisions, and it must be assumed that the legislature acted with full knowledge of prior legislation.

Grove vs. Kittle
101 NE 2nd 830; 122 Ind. App. 278

(4) A statute may be repealed by implication, but such is disfavored, but if the Statutes are irreconcilable they shall be treated as repealed.

It has been held that "Implied repeal of a prior Act by a later one can only be recognized and upheld, when the later Act is so repugnant to the earlier as to render the conflict between them irreconcilable;

and if possible, the Court will adopt a construction which, under the particular circumstances, will permit both Acts to stand."

County Department of Welfare vs. Nickols
223 Ind 467; 62 NE 2nd 146

(5) The Courts of review have held that "If a new Statute covers the subject-matter of a prior statute, and the new Statute is evidenctly intended to revise the prior Act or part thereof, the new Statute takes the place of the old Act, or part thereof.

State ex rel O'Donnell vs. Flickinger (1937)
211 Ind 361; 7 NE 2nd 192

The Court therefore now finds that the section of the Implied Consent Statute of 1971 referred to, Supra, being mandatory in nature, and evidently intended to revise the prior Act of 1939, as amended in 1951, which grants police officers the power to arrest without a warrant for the offense of DUI when coupled with an accident upon probable cause, even though not in the presence of the officer; that part of the 1971 Implied Consent Act, heretofore referred to, is the Controlling Act and takes the place of the old Act in part, and the old Act is superceded in part.

III.

1. The Court must next determine whether

or not the probable cause affidavit filed in said cause, prior to the issuance of an arrest warrant, was sufficient under the Fourth Amendment to the Federal Constitution, or under Article One, Section Eleven of the Indiana Constitution.

2. The Supreme Court of Indiana in

Kinniard vs. State
242 NE 2nd 500, at page 504

made the following observation: It is provided by Statute, Indiana Annotated Statute 9-1001, that a warrant for arrest will issue when an indictment is found or an affidavit filed against a person charging him with the commission of an offense. The procedure for filing the affidavit is found in Indiana Statutes S 9-908 and 9-909 (1956) Replacement. As the provisions of both the State and Federal Constitutions require a showing of probable cause before a warrant may issue, and since a statute may not be in derogation of rights and safeguards secured by the Constitution it follows that S 9-908, 9-909 and 9-1001 Indiana Annotated Statutes (1956 Replacement) must be read in pari materia with Article I, Section 11 of the Constitution (Supra) as requiring the affidavit to contain a showing of probable cause sufficient to justify the issuance of a warrant.

Hence the question is, what constitutes a showing of probable cause sufficient to justify the issuance of a warrant for an arrest?

3. The Supreme Court further said "In determining that issue, the Supreme Court of the United States in

Giordenello vs. United States (1958)
357 US 480; 78 S.CT 1245; 1 L.Ed 2nd 1503

stated: "The language of the Fourth Amendment of course applies to arrest as well as search warrants."

In

Ker vs. California (1963)
374 US 23; 83 S. Ct. 1623; 10 L. Ed 726

it was held that the Fourth "Amendment's proscriptions are enforced against the States through the Fourteenth Amendment". It therefore follows that we are required to apply the same constitutional standards relating to probable cause in the issue of arrest warrants as are applied to search warrants.

4. The Supreme Court referring to a United States Supreme Court decision said: "In

Aguilar vs. Texas (1964)
378 US 108; 84 S.Ct. 1509; 12 L. Ed. 2nd 723

the Supreme Court of the United States was confronted with questions concerning the constitutional requirements for obtaining

a search warrant. There the affidavit merely recited that the "Affiants have received reliable information from a credible person and do believe" that narcotics were kept in a certain building."

The Court in Aguilar stated: "Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant,

Jones vs. United States 362 US 257;
80 S.CT. 725; 4 L.ED. 2nd 697;
78 ALR 2nd 233,

the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, see

Rugendorf vs. United States
376 US 528; 84 S.CT. 825;
11 L.ED. 2nd 887

was 'credible' or his information 'reliable'.

84 S. CT. 1509, 1514; 12 L. Ed. 2nd 723, 729

It is clear from the above passage that hearsay information so long as it is reliable and stems from a credible source, has been used as a basis for probable cause to support the issuance of a warrant.

5. The Supreme Court of Indiana set forth in its findings that an affidavit, which

merely states the conclusions of the affiant is insufficient to establish probable cause. In Giordenello vs. United States, Supra, the Supreme Court decided the question of whether an arrest warrant is valid if the supporting affidavit only alleges that the suspect committed a crime without stating facts to support the conclusion. There the Court said:

"The purpose of the complaint, then, is to enable the appropriate magistrate, here a Commissioner, to determine whether the 'probable cause' required to support a warrant exists. The Commissioner must judge for himself the persuasiveness of the facts relied on by the complaining officer to show probable cause. He should not accept without question the complainant's mere conclusion that the person whose arrest is sought has committed a crime" 357 US 480, 486; 78 S.Ct, 1245, 1250.

Thus the mere allegation, without more, that the individual whose arrest is sought has committed a crime is an insufficient basis upon which to issue an arrest warrant. The affidavit will be deemed sufficient, however, if the allegation is supported by enough of the underlying facts and circumstances to allow a "neutral and detached

magistrate' to draw his own conclusion as to the existance of probable cause.

The Supreme Court, at page 506 of this decision made it clear that the requirement that the determination of probable cause be a judicial determination is a requirement that goes to the heart of the Fourth Amendment. As was stated by the Supreme Court in Johnson vs. United States (1948) 333 US 10; 68 S. CT. 367; 92 L. 3d 436:

"The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime" 333 US 10, 13; 68 S.CT 367, 369

SEE ALSO: State ex rel French vs Hendricks Superior Court 247 NE 2nd 519

for a complete definition of probable cause.

7. In order to aid the Court in determining the true meaning of probable cause in such a case as this, the Court seeks guidance from the implied consent law, which is 9-4-4.5-1, also Burns Indiana Statutes 47-2003(c).

(B) "The term probable cause for the purposes of this chapter shall mean the same as the term reasonable grounds, facts and circumstances known to the officer, which would warrant a prudent officer to believe that the offense in question had been committed".

8. The implied consent law 9-4-4.5-4, 47-2003(f):

(A) Sets forth examples as to how probable cause for driving under the influence may be determined:

i. Erractic or unusual driving behavior

ii. Appearance of the accused when detained, such as watery or blood-shot eyes, flushed or pale face, expanded or contracted pupils of the eyes, condition of clothing, and so forth.

iii. Behavior of the accused when detained, such as ability to speak and or express himself orally, finger dexterity, steadiness on feet, ability to perform simple tests, requiring normal co-ordination or balance.

iv. Odor of alcoholic beverages, presence of alcoholic beverage containers.

v. Any other fact perceived by law enforcement officers with reference to the accused, or any report received from another person by the officer with reference to the

accused, including reports of witnesses, physicians, and so forth.

In the determination of probable cause, it shall also be proper for the Court to consider photographs, tape recordings, both audio and video, and motion pictures taken of the accused for the purpose of illustrating his physical and mental condition at the time of detention.

9. The United States Supreme Court in the case of

Schmerber vs. California (1966)
16 Law Ed 2nd 908

defined probable cause: "There was plainly probable cause for the officer to arrest petitioner and charge him with driving an automobile while under the influence of intoxicating liquor. The police officer who arrived at the scene shortly after the accident smelled liquor on petitioner's breath, and testified that petitioner's eyes were "bloodshot, watery, sort of a glassy appearance'. The officer saw petitioner again at the hospital, within two hours of the accident. There he noticed similar symptoms of drunkenness. That thereupon the officer informed the petitioner "That he was under arrest and that he was entitled to the services of an attorney, and that he could remain silent, and that anything he told me would

be used against him in evidence".

10. The Supreme Court of Indiana in

DeVaney vs. State
288 NE 2nd 732

in an opinion written by Justice Hunter, at page 735, adopted the definition of probable cause as set forth in the Schmerber case, the DeVaney case was an outgrowth of an accident in January of 1969, prior to the implied consent law of 1971, and its holdings are applicable only to probable cause definition, and has nothing to do with the implied consent law of 1971.

11. Because there was no arrest without a warrant of the defendant, prior to the issuing of a warrant by this Court based upon the probable cause affidavit filed by the Prosecuting Attorney, the Court must also scrutenize the Statute concerning the issuance of an arrest warrant, based upon a probable cause affidavit:

The Statute Burns 9-602 (IC 35-1-6-2) (1969) in part reads as follows, to-wit: "Affidavit--Contents and form--Evidence of Probable Cause: No warrant for search or arrest shall be issued until there is filed with the justice of the peace, judge of any city court or magistrate's court or the judge of any court of record, an affidavit, particularly describing the house or place

to be searched and the things to be searched for, or particularly describing the person to be arrested, and alleging substantially the offense in relation thereto, and that the affiant believes and has good cause to believe that such things as are to be searched for are there concealed, or that the person to be arrested committed said offense, and setting forth the facts then in knowledge of the affiant or information based on credible hearsay, constituting the probable cause. When based on credible hearsay, the affidavit shall contain reliable information supplied to the affiant by a credible person, named or unnamed, and it shall contain the following:

(a) Affirmative allegations that the credible person spoke with personal knowledge of the matters contained therein.

(b) The facts within the personal knowledge of the credible person.

(c) The facts within the affiant's knowledge as to the credibility of the credible person.

12. The smell of intoxicants alone without more will not support a finding of intoxication.

Jones vs. State (1974)
315 NE 2nd 403, 405

From these authorities it is clearly

shown that the probable cause affidavit filed in said Court, upon facts known at the time of the accident, is clearly insufficient, unless that part referring to a blood sample taken from the defendant would strengthen the affidavit to such an extent as would support and be a basis for the issuance of an arrest warrant.

IV.

The Court must consider whether or not the procedure in removing the blood from the defendant's body and its examination as to the alcoholic content of the defendant's blood was proper.

1. The implied consent law heretofore referred to provides in Sections 9-4-4.5-6 (47-2003h) is as follows: Chemical test operators--Selection, training and certification--Inspection of chemical devices.--The director of the State Department of Toxicology of the Indiana University School of Medicine is hereby authorized and empowered to adopt the necessary rules and regulations to set standards for the selection, training, certification and recertification of chemical test operators and to provide for the periodic inspection of chemical devices. No chemical test for intoxication shall be considered as evidence for the purpose of this chapter

(9-4-4.5-1 - 9-4-4.5-6) if it is not performed by a person certified as a valid operator by the state department of toxicology of the Indiana University School of Medicine, and no equipment shall be used for such chemical tests which has not been inspected and approved under the rules and regulations adopted by such department.

2. The implied consent law also provides in Section 9-4-4.5-3 (47-2003e) Opportunity to submit to chemical test prior to arrest-- Any law enforcement officer authorized to enforce the laws of this state regulating the use and operation of vehicles on public highways who has probable cause to believe that any person has committed the offense of driving or being in actual physical control of a vehicle while under the influence, in his presence or view, or who has probable cause to believe that any person who has been involved in a motor vehicle accident has committed such offense, though not in his presence or view, shall not place such person under arrest for such offense until he has first offered to such person the opportunity to submit to a chemical test for intoxication to be administered by a person certified as a valid chemical test operator by the Department of Toxicology

of the Indiana University School of Medicine. Any such person who agrees to submit to such chemical test for intoxication shall not be arrested for driving while under the influence, but shall accompany the officer to the nearest available chemical test device for the purpose of taking such test as a condition of the driving privilege. If such chemical test results in prima facie evidence that such person is not under the influence, he shall not be arrested and charged with such offense and he shall be released immediately.

3. The Indiana General Assembly in 1971, by this Act set forth rules of evidence for Courts to follow in such cases, and the Supreme Court of the United States has held "the rules of evidence, however, are established not alone by the Courts, but by the Legislature"

Tot vs. United States
319 U. S. 463; 87 Law Ed 1519

4. The Indiana Supreme Court in the case of

Klebs vs. State
305 NE 2nd 781 at page 782

refers to Indiana Code 9-4-1-45, Indiana Annotated Statutes 47-2003, Burns 1973, which provides as evidence by weight of alcohol in defendant's blood ties in Burns Statutes 47-2003(h) and demands that both

Statutes be read together, when the Indiana Court of Appeals said "another Statute sets forth certain requirements that must be met prior to the test results being accepted as evidence."

5. The most recent of all cases is the case entitled

Jones vs. State (1974)
315 NE 2nd 403

This is the only case referring directly to a blood alcohol analysis, the Court of Appeals in clear language stated at page 404. "We need not decide whether certification of devices per se has thus become a requirement to producing an admissible test result. It certainly is not mandated by the Statute. The Statute does mandate that the device be inspected and approved under the rules and regulations adopted by the department of toxicology. This the state has failed to establish. The test result was therefore inadmissible."

5. Letters from Robert B. Forney, Ph.D. Professor of Toxicology, which were introduced into evidence, revealed that the Indiana State Department of Toxicology has not certified methodology, equipment or persons for making direct blood analysis for ethanol, and he further states that the Legislature funded the Department to train and certify

police officers to make the breath analysis for ethanol.

7. It seems very clear to this Court from these authorities that the State Board of Toxicology has failed to comply with this Statute, in that through its own admission that equipment used in direct blood analysis has not been inspected by that body, and has not certified equipment or persons for making direct blood analysis for ethanol, and therefore are clearly inadmissible in evidence.

It is also quite obvious that the police officers who demanded the blood test, did not offer the defendant a choice, and therefore did not comply with the Statute, and for that further reason the results of the blood test is not admissible.

V.

The Court must now consider the Implied Consent Statute of 1971 and determine whether or not the legislation is Constitutional:

It has been held by a Federal District Court in the case of

Holland vs. Parker (1973)
354 Fed Supplement 196

that a South Dakota implied consent law is unconstitutional for failure to require a lawful arrest prior to a request for

submission to blood-alcohol analysis as violating the Fourth Amendment of the Federal Constitution.

The Federal District Court said on page 198, "A majority of the States have enacted implied Consent Statutes and most of them have followed New York's Statute in requiring a lawful arrest as a pre-condition to its application".

The Federal Court citing Schmerber vs. California, Supra, and other cases, concludes "... that the Fourth Amendment requires a lawful arrest prior to a request for submission to a blood test. To demand that a licensed driver be subjected to a choice involving important interests, and possibly an intrusion into his body, without the procedural safeguard of a lawful arrest would be inconsistent with the teachings of Schmerber vs. California ..."

"The judges of this panel are not unaware of the absolute necessity and public desire for strict police control over the drivers upon our highways. The rules concerning the taking of a blood test were born of necessity and must be substantially retained. However, they must be retained legally and not at the expense of the Constitutional rights of the public."

This Court agrees with the attorney for

the defendant when in his memorandum filed on December 9, 1974, Paragraph D, he said: "Further, since the obvious legislative purpose of the procedure of IC 9-4-4.5-3 was not only to facilitate and expedite the prosecution of persons driving under the influence, but also to protect the innocent from being subjected to the jeopardy of criminal prosecution..."

This Statute under consideration gives the defendant much more protection and much greater rights than either the Indiana Constitution or the 4th, 5th, 6th or 14th Amendments of the United States Constitution demand or require.

Even though there may be some question as to whether or not this Statute violates the Constitution, a Statute must be construed so as to uphold it, if that be fairly possible; and if it be of doubtful constitutionality, the doubts are to be resolved in favor of enactment.

Courts will not presume that the legislature acted in bad faith or attempted to evade the Constitution in the enactment of a Statute, and they should be construed to prevent absurdity, hardship or injustice, to favor public convenience and oppose all prejudice to public interests.

Lost Creek School Township vs. York
215 Ind 636; 21 NE 2nd 58; 127 ALR 1287

The Court now, after having reviewed the law of the State of Indiana and the many decisions of the Indiana Supreme Court, the Federal Courts and the Supreme Court of the United States, now finds that the 1971 Implied Consent law does not offend or violate either the Constitution of Indiana or the Constitution of the United States, and is therefore Constitutional.

VI.

The Court having heretofore found that the probable cause affidavit filed prior to the issuance of an arrest warrant was insufficient, for the reason that it does not state facts sufficient to show probable cause. The question now is: Did the Court acquire jurisdiction of the defendant herein, even though the warrant was illegally issued?

1. The Court acquires no jurisdiction of the person in such a case, if an arrest warrant has been illegally issued and a reasonable objection has been made, and that the defendant has not voluntarily submitted himself to the jurisdiction of the Court. The rule correctly stated is as follows: "Jurisdiction of the person of the defendant may be acquired by consent of the accused, or by waiver of objections. If he fails to make his objection in time, he will be

deemed to have waived it. Such an objection is waived by pleading not guilty and going to trial."

4 Wharton Criminal Law & Procedure
Section 1481, page 36

The Supreme Court in

French ex rel State vs. Hendricks
Superior Court, Supra

held that the illegality of an arrest can be made at any time prior to entering a plea, and if the arrest is illegal, the defendant shall be discharged.

Many cases have held that even if an arrest is illegal, it does not amount to a denial of due process, and does not in any way effect a judgment of conviction, however, it is important to note that in not one case did the Court ever state that an illegal arrest vested the Court with jurisdiction over the person of the defendant, and in the case of

Smith v. State (1957)
143 NE 2nd 408

held: That an illegal arrest will not vest a Court with jurisdiction of the person.

The Court therefore finds that since the arrest was illegal and that the jurisdiction of the Court was questioned prior to a plea, that the Court has no jurisdiction in said matter, and that the defendant is entitled to be discharged, and the Information dismissed.

VII.

The defendant further requests that the State of Indiana be barred from further prosecution in said cause of action:

1. This procedure is available to the Court in appropriate cases:

Burns Indiana Statutes Section 9-906(E)
Indiana Code 35-3.1-1-4(e)

Motion to Dismiss, states as follows: (e) the order of dismissal shall not, of itself, constitute a bar to a subsequent prosecution of the same crime or crimes except as otherwise modified or removed by an appropriate order of the Court."

The Court after determining this entire matter, feels that it would not be appropriate to bar the State from bringing any further actions in said cause, if and when they can procure or secure evidence within the Statute of Limitations.

VIII:

The Indiana Supreme Court, in a recent case entitled State of Indiana vs. Superior Court of Shelby County (1975) 321 NE 2nd 204, 205, in referring to a pathetic deficiency in the Juvenile Court Law, made the following observation at page 205: "This Court does not make the laws ... the Legislature has those problems. Not all solutions to our social problems lie within the judiciary." This Court would make only

a few observations, that prior to the passage of the implied consent law in 1971, under the Schmerber vs. California case of the United States Supreme Court, every police officer, law enforcement officer, Prosecutor, Attorney and Judge knew the limitations and the law as to blood tests, the Supreme Court of the United States made it very clear that in driving under the influence cases, because of an exigency in such cases that a search and seizure by the taking of blood from the defendant, could be done without violation to his Constitutional rights, either under the Fourth or Fourteenth Amendment, provided that the defendant was lawfully arrested. It was very clear that such a search was incident to a lawful arrest, we needed no further law on the subject, and even as far back as 1956, in the case of

Breithaupt vs. Abram
1 Law Ed 2nd 448

The Supreme Court held that in a case involving involuntary manslaughter arising from an automobile collision involving an automobile driven by the petitioner while intoxicated, that the result of a test based on a sample of blood taken at the request of a police officer by a physician, from the accused, while the latter was

unconscious, was admitted into evidence, and was not in violation of the defendant's Constitutional rights.

The remedy for this situation, for the sake of all persons concerned, including the general public, should be:

1. That the Legislature consider amending the implied consent law and specifically limiting it to cases where the alcohol blood content shall be determined by breath analysis.

2. The Legislature could consider funding this project and granting a sufficient sum of money to the Department of Toxicology so that the department may carry out the mandates of the Legislature, which is now nearly four years old.

3. The Legislature could consider repealing the entire implied consent Statute, and law enforcement officers, Judges, Prosecutors and lawyers could then rely entirely on the Schmerber case, whic proved to be very adequate.

CONCLUSIONS OF LAW

1. The law is with the defendant in that:

(a). It is therefore now ordered, adjudged and decreed by the Court that the defendant now be discharged and this cause now be dismissed.

2. The law is with the State of Indiana in that:

(a) It is ordered that the State of Indiana shall not be enjoined from further prosecution.

(b) It is further ordered that the Implied Consent law is Constitutional and does not violate the express provisions of either the Indiana Constitution or the Constitution of the United States.

Judgement accordingly.

/s/ Myles F. Parrish
Myles F. Parrish, Judge
Adams Circuit Court

(SEAL)

Dated this 25th day of February, 1975

"APPENDIX C"

STATE OF INDIANA
COUNTY OF ADAMS, SS:
STATE OF INDIANA
VS.
CLAYTON L. HUMMEL

IN THE ADAMS CIRCUIT COURT
JANUARY SESSION, 1975 TERM
CAUSE NO. 4442
RULING ON MOTION TO DISMISS
AND
SPECIAL FINDINGS OF FACTS

Comes now the State of Indiana by Daniel C. Burry, Prosecuting Attorney of the 26th Judicial Circuit; comes now the defendant, Clayton L. Hummel, in person and by his counsel, Joseph M. Johnson, and the motion to dismiss heretofore filed on December 9, 1974, having been submitted to this Court for hearing and determination on January 3, 1975, but not concluded, and further evidence was submitted on January 10, 1975, and the Court then having seen and inspected said motion to dismiss, having heard evidence submitted thereon, and being sufficiently advised in the premises, took said matter under advisement and directed the parties herein to file a trial brief on or before January 30, 1975.

It further appears to the Court that on January 30, 1975, the parties herein filed a trial brief, and on February 5, 1975, the defendant, by his counsel, filed a response to State's brief and a motion to strike.

The Court now having seen and inspected said briefs and being sufficiently advised in the premises, now finds as follows, to-wit:

1. That the defendant herein was charged by information on the 27th day of September, 1974, with the crime of driving while under the influence of intoxicating liquor, causing the death of another.

2. That on or about the 16th day of September, 1974, the defendant was involved in a motor vehicle accident, and a sample of blood was extracted from his body immediately following the accident at the request of Officer William Kuhn of the Indiana State Police.

3. The Court further finds that the blood sample extracted from the defendant's body was extracted by Nurse Winona Eichar, while on duty in the emergency room of the Adams County Memorial Hospital, where the defendant was taken immediately after the accident.

4. The Court further finds that Nurse Winona Eichar is not a person certified as

a valid chemical test operator by the Department of Toxicology of the Indiana University School of Medicine.

5. The Court further finds that the said defendant herein was transported from the scene of the accident to the Adams County Memorial Hospital by Richard Linn and Elmer Winteregg.

6. The Court further finds that the said Richard Linn and Elmer Winteregg were told by certain officers that all of the injured persons had been taken care of, and that they should return to Decatur, but that the said ambulance drivers then found the defendant leaning against an automobile with his face covered with blood, that the said ambulance drivers placed the defendant in the ambulance, and took him to the Adams County Memorial Hospital for emergency treatment.

7. The Court further finds that the defendant remained in the Adams County Memorial Hospital for a few days and was later released.

8. The Court further finds that Officer William Kuhn of the Indiana State Police testified that he had smelled alcohol on the defendant's breath, and that Nurse Winona Eichar testified that she smelled a slight trace of alcohol upon his breath,

however, Dr. John Doan, the two ambulance drivers and another person stated that they smelled no alcohol on his breath.

9. The Court further finds that two persons, who were passengers in another vehicle, and who were involved in the collision, were killed instantaneously.

The Court does not intend to encompass all of the evidence given in this case, and does not limit its findings merely on the facts elicited in this ruling, but the Court bases its findings upon all the evidence that was given, this being only a small portion of it, but perhaps some of the most important parts.

I.

The first question the Court must decide is whether or not the defendant was arrested at the scene of the accident, or in the Adams County Memorial Hospital without a warrant.

The Indiana Supreme Court in the recent case of

Dillon v. State (1971)
275 NE 2nd 312, 315

defines an arrest: "Arrest defined -- Arrest is the taking of a person into custody, that he may be held to answer for a public offense", and the Supreme Court has stated further: "Arrest -- now made: An arrest is made by an actual restraint of the person of the defendant, or by his submission to the custody of the officer, but the defendant shall not be subjected to any more restraint than is necessary for his arrest and detention".

A further definition of arrest is found in

4 Am Jur, Arrest, Section 2

"Arrest is the taking, seizing, or detaining of the person of another, either by touching, or putting hands on him, or by any act which indicates detention, to take him into custody and subjects the person arrested to the actual control and will of

the person making the arrest. The act relied upon as constituting an arrest must have been performed with the intent to effect an arrest and must have been so understood by the party arrested".

SEE ALSO: Dixon vs. Shiner
163 NW 2nd 481, 485

It has also been held in

5 Am Jur 2nd, Arrest,
Section 75, page 761

"It is the duty of an officer who has arrested a person to keep him safely, until it is possible to deliver him before a magistrate."

Burns Indiana Statutes 9-4-1-130 (47-2307) provides:

"That when a person is arrested and charged with an offense or causing, or contributing to an accident resulting in injury or death to any person, or when such person is arrested on a charge of driving under the influence of intoxicating liquors, shall be immediately taken before a magistrate."

It is clear from this evidence that under these decisions the defendant was not arrested without a warrant.

II.

The Court must determine whether or not the Implied Consent Statute 9-4-4.5-3 (47-2003e) of the 1971 General Assembly which

provides that a law enforcement officer shall not place a person under arrest for the offense of driving under the influence, until the person is first offered the opportunity to submit to a chemical test for intoxication ... has repealed in part 9-4-1-134 (47-2310) by implication, which statute is a 1939 Act as amended in 1951, which provides that a peace officer may, without a warrant arrest a person in case of violation of 9-4-1-40 (47-1910) commonly referred to as the leaving the scene of an accident involving death or injuries to persons and property and (9-4-1-54) subsection (b) which is commonly referred to as Driving Under the Influence Statute, if the violation is coupled with an accident, which in fact has been committed, though not in the officer's presence, when he has reasonable cause to believe that the violation was committed by such person.

(1) The sentence containing the words "shall not place the person under arrest" is mandatory and not discretionary as the word "may" implies.

SEE: The word "shall" used in the Statute is presumed to have been used in the imperative sense.

Board of Finance of School City of Aurora vs. Peoples National Bank
44 App 578; 89 NE 904

(2) It is the rule of law that when a number of Statutes, no matter when passed, relate to the same thing, or general subject matter, they are to be construed together, so that all may be given effect and produce a harmonious system, are in pari materia, and it is also presumed that new laws are enacted with reference to existing laws.

Pittsburgh C.,C. & St. L.R. Co., vs Home Insurance Co.,
73 App 226; 125 NE 427

Brownsburg vs. Trucksess
98 App 322; 185 NE 315

(3) The Legislature is presumed to be acquainted with existing law, and in legislating on any subject, to have in view its provisions, and it must be assumed that the legislature acted with full knowledge of prior legislation.

Grove vs. Kittle
101 NE 2nd 830; 122 Ind. App. 278

(4) A statute may be repealed by implication, but such is disfavored, but if the Statutes are irreconcilable they shall be treated as repealed.

It has been held that "Implied repeal of a prior Act by a later one can only be recognized and upheld, when the later Act is so repugnant to the earlier as to render the conflict between them irreconcilable;

and if possible, the Court will adopt a construction which, under the particular circumstances, will permit both Acts to stand."

County Department of Welfare vs. Nickols
223 Ind 467; 62 NE 2nd 146

(5) The Courts of review have held that "If a new Statute covers the subject-matter of a prior statute, and the new Statute is evidenctly intended to revise the prior Act or part thereof, the new Statute takes the place of the old Act, or part thereof.

State ex rel O'Donnell vs. Flickinger (1937)
211 Ind 361; 7 NE 2nd 192

The Court therefore now finds that the section of the Implied Consent Statute of 1971 referred to, Supra, being mandatory in nature, and evidently intended to revise the prior Act of 1939, as amended in 1951, which grants police officers the power to arrest without a warrant for the offense of DUI when coupled with an accident upon probable cause, even though not in the presence of the officer; that part of the 1971 Implied Consent Act, heretofore referred to, is the Controlling Act and takes the place of the old Act in part, and the old Act is superceded in part.

III.

1. The Court must next determine whether

or not the probable cause affidavit filed in said cause, prior to the issuance of an arrest warrant, was sufficient under the Fourth Amendment to the Federal Constitution, or under Article One, Section Eleven of the Indiana Constitution.

2. The Supreme Court of Indiana in

Kinniard vs. State
242 NE 2nd 500, at page 504

made the following observation: It is provided by Statute, Indiana Annotated Statute 9-1001, that a warrant for arrest will issue when an indictment is found or an affidavit filed against a person charging him with the commission of an offense. The procedure for filing the affidavit is found in Indiana Statutes S 9-908 and 9-909 (1956) Replacement. As the provisions of both the State and Federal Constitutions require a showing of probable cause before a warrant may issue, and since a statute may not be in derogation of rights and safeguards secured by the Constitution it follows that S 9-908, 9-909 and 9-1001 Indiana Annotated Statutes (1956 Replacement) must be read in pari materia with Article I, Section 11 of the Constitution (Supra) as requiring the affidavit to contain a showing of probable cause sufficient to justify the issuance of a warrant.

Hence the question is, what constitutes a showing of probable cause sufficient to justify the issuance of a warrant for an arrest?

3. The Supreme Court further said "In determining that issue, the Supreme Court of the United States in

Giordenello vs. United States (1958)
357 US 480; 78 S.CT 1245; 1 L.Ed 2nd 1503

stated: "The language of the Fourth Amendment of course applies to arrest as well as search warrants."

In

Ker vs. California (1963)
374 US 23; 83 S. Ct. 1623; 10 L. Ed 726

it was held that the Fourth "Amendment's proscriptions are enforced against the States through the Fourteenth Amendment". It therefore follows that we are required to apply the same constitutional standards relating to probable cause in the issue of arrest warrants as are applied to search warrants.

4. The Supreme Court referring to a United States Supreme Court decision said: "In

Aguilar vs. Texas (1964)
378 US 108; 84 S.Ct. 1509; 12 L. Ed. 2nd 723

the Supreme Court of the United States was confronted with questions concerning the constitutional requirements for obtaining

a search warrant. There the affidavit merely recited that the "Affiants have received reliable information from a credible person and do believe" that narcotics were kept in a certain building."

The Court in Aguilar stated: "Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant,

Jones vs. United States 362 US 257;
80 S.CT. 725; 4 L.ED. 2nd 697;
78 ALR 2nd 233,

the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, see

Rugendorf vs. United States
376 US 528; 84 S.CT. 825;
11 L.ED. 2nd 887

was 'credible' or his information 'reliable'.

84 S. CT. 1509, 1514; 12 L. Ed. 2nd 723, 729

It is clear from the above passage that hearsay information so long as it is reliable and stems from a credible source, has been used as a basis for probable cause to support the issuance of a warrant.

5. The Supreme Court of Indiana set forth in its findings that an affidavit, which

(B) "The term probable cause for the purposes of this chapter shall mean the same as the term reasonable grounds, facts and circumstances known to the officer, which would warrant a prudent officer to believe that the offense in question had been committed".

8. The implied consent law 9-4-4.5-4, 47-2003(f):

(A) Sets forth examples as to how probable cause for driving under the influence may be determined:

i. Erractic or unusual driving behavior

ii. Appearance of the accused when detained, such as watery or blood-shot eyes, flushed or pale face, expanded or contracted pupils of the eyes, condition of clothing, and so forth.

iii. Behavior of the accused when detained, such as ability to speak and or express himself orally, finger dexterity, steadiness on feet, ability to perform simple tests, requiring normal co-ordination or balance.

iv. Odor of alcoholic beverages, presence of alcoholic beverage containers.

v. Any other fact perceived by law enforcement officers with reference to the accused, or any report received from another person by the officer with reference to the

accused, including reports of witnesses, physicians, and so forth.

In the determination of probable cause, it shall also be proper for the Court to consider photographs, tape recordings, both audio and video, and motion pictures taken of the accused for the purpose of illustrating his physical and mental condition at the time of detention.

9. The United States Supreme Court in the case of

Schmerber vs. California (1966)
16 Law Ed 2nd 908

defined probable cause: "There was plainly probable cause for the officer to arrest petitioner and charge him with driving an automobile while under the influence of intoxicating liquor. The police officer who arrived at the scene shortly after the accident smelled liquor on petitioner's breath, and testified that petitioner's eyes were "bloodshot, watery, sort of a glassy appearance'. The officer saw petitioner again at the hospital, within two hours of the accident. There he noticed similar symptoms of drunkenness. That thereupon the officer informed the petitioner "That he was under arrest and that he was entitled to the services of an attorney, and that he could remain silent, and that anything he told me would

be used against him in evidence".

10. The Supreme Court of Indiana in

DeVaney vs. State
288 NE 2nd 732

in an opinion written by Justice Hunter, at page 735, adopted the definition of probable cause as set forth in the Schmerber case, the DeVaney case was an outgrowth of an accident in January of 1969, prior to the implied consent law of 1971, and its holdings are applicable only to probable cause definition, and has nothing to do with the implied consent law of 1971.

11. Because there was no arrest without a warrant of the defendant, prior to the issuing of a warrant by this Court based upon the probable cause affidavit filed by the Prosecuting Attorney, the Court must also scrutenize the Statute concerning the issuance of an arrest warrant, based upon a probable cause affidavit:

The Statute Burns 9-602 (IC 35-1-6-2) (1969) in part reads as follows, to-wit: "Affidavit--Contents and form--Evidence of Probable Cause: No warrant for search or arrest shall be issued until there is filed with the justice of the peace, judge of any city court or magistrate's court or the judge of any court of record, an affidavit, particularly describing the house or place

to be searched and the things to be searched for, or particularly describing the person to be arrested, and alleging substantially the offense in relation thereto, and that the affiant believes and has good cause to believe that such things as are to be searched for are there concealed, or that the person to be arrested committed said offense, and setting forth the facts then in knowledge of the affiant or information based on credible hearsay, constituting the probable cause. When based on credible hearsay, the affidavit shall contain reliable information supplied to the affiant by a credible person, named or unnamed, and it shall contain the following:

(a) Affirmative allegations that the credible person spoke with personal knowledge of the matters contained therein.

(b) The facts within the personal knowledge of the credible person.

(c) The facts within the affiant's knowledge as to the credibility of the credible person.

12. The smell of intoxicants alone without more will not support a finding of intoxication.

Jones vs. State (1974)
315 NE 2nd 403, 405

From these authorities it is clearly

shown that the probable cause affidavit filed in said Court, upon facts known at the time of the accident, is clearly insufficient, unless that part referring to a blood sample taken from the defendant would strengthen the affidavit to such an extent as would support and be a basis for the issuance of an arrest warrant.

IV.

The Court must consider whether or not the procedure in removing the blood from the defendant's body and its examination as to the alcoholic content of the defendant's blood was proper.

1. The implied consent law heretofore referred to provides in Sections 9-4-4.5-6 (47-2003h) is as follows: Chemical test operators--Selection, training and certification--Inspection of chemical devices.--The director of the State Department of Toxicology of the Indiana University School of Medicine is hereby authorized and empowered to adopt the necessary rules and regulations to set standards for the selection, training, certification and recertification of chemical test operators and to provide for the periodic inspection of chemical devices. No chemical test for intoxication shall be considered as evidence for the purpose of this chapter

(9-4-4.5-1 - 9-4-4.5-6) if it is not performed by a person certified as a valid operator by the state department of toxicology of the Indiana University School of Medicine, and no equipment shall be used for such chemical tests which has not been inspected and approved under the rules and regulations adopted by such department.

2. The implied consent law also provides in Section 9-4-4.5-3 (47-2003e) Opportunity to submit to chemical test prior to arrest--Any law enforcement officer authorized to enforce the laws of this state regulating the use and operation of vehicles on public highways who has probable cause to believe that any person has committed the offense of driving or being in actual physical control of a vehicle while under the influence, in his presence or view, or who has probable cause to believe that any person who has been involved in a motor vehicle accident has committed such offense, though not in his presence or view, shall not place such person under arrest for such offense until he has first offered to such person the opportunity to submit to a chemical test for intoxication to be administered by a person certified as a valid chemical test operator by the Department of Toxicology

of the Indiana University School of Medicine. Any such person who agrees to submit to such chemical test for intoxication shall not be arrested for driving while under the influence, but shall accompany the officer to the nearest available chemical test device for the purpose of taking such test as a condition of the driving privilege. If such chemical test results in prima facie evidence that such person is not under the influence, he shall not be arrested and charged with such offense and he shall be released immediately.

3. The Indiana General Assembly in 1971, by this Act set forth rules of evidence for Courts to follow in such cases, and the Supreme Court of the United States has held "the rules of evidence, however, are established not alone by the Courts, but by the Legislature"

Tot vs. United States
319 U. S. 463; 87 Law Ed 1519

4. The Indiana Supreme Court in the case of

Klebs vs. State
305 NE 2nd 781 at page 782

refers to Indiana Code 9-4-1-45, Indiana Annotated Statutes 47-2003, Burns 1973, which provides as evidence by weight of alcohol in defendant's blood ties in Burns Statutes 47-2003(h) and demands that both

Statutes be read together, when the Indiana Court of Appeals said "another Statute sets forth certain requirements that must be met prior to the test results being accepted as evidence."

5. The most recent of all cases is the case entitled

Jones vs. State (1974)
315 NE 2nd 403

This is the only case referring directly to a blood alcohol analysis, the Court of Appeals in clear language stated at page 404. "We need not decide whether certification of devices per se has thus become a requirement to producing an admissible test result. It certainly is not mandated by the Statute. The Statute does mandate that the device be inspected and approved under the rules and regulations adopted by the department of toxicology. This the state has failed to establish. The test result was therefore inadmissible."

5. Letters from Robert B. Forney, Ph.D. Professor of Toxicology, which were introduced into evidence, revealed that the Indiana State Department of Toxicology has not certified methodology, equipment or persons for making direct blood analysis for ethanol, and he further states that the Legislature funded the Department to train and certify

police officers to make the breath analysis for ethanol.

7. It seems very clear to this Court from these authorities that the State Board of Toxicology has failed to comply with this Statute, in that through its own admission that equipment used in direct blood analysis has not been inspected by that body, and has not certified equipment or persons for making direct blood analysis for ethanol, and therefore are clearly inadmissible in evidence.

It is also quite obvious that the police officers who demanded the blood test, did not offer the defendant a choice, and therefore did not comply with the Statute, and for that further reason the results of the blood test is not admissible.

V.

The Court must now consider the Implied Consent Statute of 1971 and determine whether or not the legislation is Constitutional:

It has been held by a Federal District Court in the case of

Holland vs. Parker (1973)
354 Fed Supplement 196

that a South Dakota implied consent law is unconstitutional for failure to require a lawful arrest prior to a request for

submission to blood-alcohol analysis as violating the Fourth Amendment of the Federal Constitution.

The Federal District Court said on page 198, "A majority of the States have enacted implied Consent Statutes and most of them have followed New York's Statute in requiring a lawful arrest as a pre-condition to its application".

The Federal Court citing Schmerber vs. California, Supra, and other cases, concludes "... that the Fourth Amendment requires a lawful arrest prior to a request for submission to a blood test. To demand that a licensed driver be subjected to a choice involving important interests, and possibly an intrusion into his body, without the procedural safeguard of a lawful arrest would be inconsistent with the teachings of Schmerber vs. California ..."

"The judges of this panel are not unaware of the absolute necessity and public desire for strict police control over the drivers upon our highways. The rules concerning the taking of a blood test were born of necessity and must be substantially retained. However, they must be retained legally and not at the expense of the Constitutional rights of the public."

This Court agrees with the attorney for

the defendant when in his memorandum filed on December 9, 1974, Paragraph D, he said: "Further, since the obvious legislative purpose of the procedure of IC 9-4-4.5-3 was not only to facilitate and expedite the prosecution of persons driving under the influence, but also to protect the innocent from being subjected to the jeopardy of criminal prosecution..."

This Statute under consideration gives the defendant much more protection and much greater rights than either the Indiana Constitution or the 4th, 5th, 6th or 14th Amendments of the United States Constitution demand or require.

Even though there may be some question as to whether or not this Statute violates the Constitution, a Statute must be construed so as to uphold it, if that be fairly possible; and if it be of doubtful constitutionality, the doubts are to be resolved in favor of enactment.

Courts will not presume that the legislature acted in bad faith or attempted to evade the Constitution in the enactment of a Statute, and they should be construed to prevent absurdity, hardship or injustice, to favor public convenience and oppose all prejudice to public interests.

Lost Creek School Township vs. York
215 Ind 636; 21 NE 2nd 58; 127 ALR 1287

The Court now, after having reviewed the law of the State of Indiana and the many decisions of the Indiana Supreme Court, the Federal Courts and the Supreme Court of the United States, now finds that the 1971 Implied Consent law does not offend or violate either the Constitution of Indiana or the Constitution of the United States, and is therefore Constitutional.

VI.

The Court having heretofore found that the probable cause affidavit filed prior to the issuance of an arrest warrant was insufficient, for the reason that it does not state facts sufficient to show probable cause. The question now is: Did the Court acquire jurisdiction of the defendant herein, even though the warrant was illegally issued?

1. The Court acquires no jurisdiction of the person in such a case, if an arrest warrant has been illegally issued and a reasonable objection has been made, and that the defendant has not voluntarily submitted himself to the jurisdiction of the Court. The rule correctly stated is as follows: "Jurisdiction of the person of the defendant may be acquired by consent of the accused, or by waiver of objections. If he fails to make his objection in time, he will be

deemed to have waived it. Such an objection is waived by pleading not guilty and going to trial."

4 Wharton Criminal Law & Procedure
Section 1481, page 36

The Supreme Court in

French ex rel State vs. Hendricks
Superior Court, Supra

held that the illegality of an arrest can be made at any time prior to entering a plea, and if the arrest is illegal, the defendant shall be discharged.

Many cases have held that even if an arrest is illegal, it does not amount to a denial of due process, and does not in any way effect a judgment of conviction, however, it is important to note that in not one case did the Court ever state that an illegal arrest vested the Court with jurisdiction over the person of the defendant, and in the case of

Smith v. State (1957)
143 NE 2nd 408

held: That an illegal arrest will not vest a Court with jurisdiction of the person.

The Court therefore finds that since the arrest was illegal and that the jurisdiction of the Court was questioned prior to a plea, that the Court has no jurisdiction in said matter, and that the defendant is entitled to be discharged, and the Information dismissed.

VII.

The defendant further requests that the State of Indiana be barred from further prosecution in said cause of action:

1. This procedure is available to the Court in appropriate cases:

Burns Indiana Statutes Section 9-906(E)
Indiana Code 35-3.1-1-4(e)

Motion to Dismiss, states as follows: (e) the order of dismissal shall not, of itself, constitute a bar to a subsequent prosecution of the same crime or crimes except as otherwise modified or removed by an appropriate order of the Court."

The Court after determining this entire matter, feels that it would not be appropriate to bar the State from bringing any further actions in said cause, if and when they can procure or secure evidence within the Statute of Limitations.

VIII:

The Indiana Supreme Court, in a recent case entitled State of Indiana vs. Superior Court of Shelby County (1975) 321 NE 2nd 204, 205, in referring to a pathetic deficiency in the Juvenile Court Law, made the following observation at page 205: "This Court does not make the laws ... the Legislature has those problems. Not all solutions to our social problems lie within the judiciary." This Court would make only

a few observations, that prior to the passage of the implied consent law in 1971, under the Schmerber vs. California case of the United States Supreme Court, every police officer, law enforcement officer, Prosecutor, Attorney and Judge knew the limitations and the law as to blood tests, the Supreme Court of the United States made it very clear that in driving under the influence cases, because of an exigency in such cases that a search and seizure by the taking of blood from the defendant, could be done without violation to his Constitutional rights, either under the Fourth or Fourteenth Amendment, provided that the defendant was lawfully arrested. It was very clear that such a search was incident to a lawful arrest, we needed no further law on the subject, and even as far back as 1956, in the case of

Breithaupt vs. Abram
1 Law Ed 2nd 448

The Supreme Court held that in a case involving involuntary manslaughter arising from an automobile collision involving an automobile driven by the petitioner while intoxicated, that the result of a test based on a sample of blood taken at the request of a police officer by a physician, from the accused, while the latter was

unconscious, was admitted into evidence, and was not in violation of the defendant's Constitutional rights.

The remedy for this situation, for the sake of all persons concerned, including the general public, should be:

1. That the Legislature consider amending the implied consent law and specifically limiting it to cases where the alcohol blood content shall be determined by breath analysis.

2. The Legislature could consider funding this project and granting a sufficient sum of money to the Department of Toxicology so that the department may carry out the mandates of the Legislature, which is now nearly four years old.

3. The Legislature could consider repealing the entire implied consent Statute, and law enforcement officers, Judges, Prosecutors and lawyers could then rely entirely on the Schmerber case, whic proved to be very adequate.

CONCLUSIONS OF LAW

1. The law is with the defendant in that:

(a). It is therefore now ordered, adjudged and decreed by the Court that the defendant now be discharged and this cause now be dismissed.

2. The law is with the State of Indiana in that:

(a) It is ordered that the State of Indiana shall not be enjoined from further prosecution.

(b) It is further ordered that the Implied Consent law is Constitutional and does not violate the express provisions of either the Indiana Constitution or the Constitution of the United States.

Judgement accordingly.

/s/ Myles F. Parrish
Myles F. Parrish, Judge
Adams Circuit Court

(SEAL)

Dated this 25th day of February, 1975

"APPENDIX D"

STATE OF INDIANA
COUNTY OF ADAMS, SS:
STATE OF INDIANA
VS.
JOSEPH D. SMITH

IN THE ADAMS CIRCUIT COURT
JANUARY SESSION, 1975 TERM
CAUSE NO. 4438
SUPPLEMENTAL RULING ON MOTION TO DISMISS & SUPPLEMENTAL FINDINGS OF FACTS AND CONCLUSIONS OF LAW

It now appears to the Court that the ruling of the Court heretofore made and entered in the above entitled cause on Februa y 25, 1975, through inadvertence and mistake, omitted findings of fact and failed to rule on a question of law raised by the defendant in his motion to dismiss.

In addition to the special findings of facts set forth in the Court's special findings of facts dated February 25, 1975, the Court further finds as follows, to-wit:

1. That the sample of blood extracted from the defendant's body was analyzed to determine its blood-alcohol content by a person not certified as a valid chemical test operator by the Department of Toxicology of the Indiana University School

of Medicine, using techniques or equipment which had not been inspected or approved by the Department of Toxicology of the Indiana University School of Medicine.

2. That the Department of Toxicology of the Indiana University School of Medicine has not certified any persons, techniques, or equipment for the making of a direct blood analysis for ethanol and has not inspected or approved any such techniques or equipment for the making of a direct blood analysis for ethanol.

3. The Court further finds that Richard Linn and David S. Haggard, the ambulance drivers who placed defendant in the ambulance and removed him and carried him into the hospital, and Dr. James Burke, nurse Ruth Winnes and nurse Lois Sharp, who treated the defendant in the emergency room shortly after the accident, all testified that they did not observe any symptoms of intoxication whatsoever about the defendant at that time, that he was cooperative, coherent and spoke clearly, and that they did not observe the defendant walk due to the fact that because of the seriousness of his injuries he was required to lay on a table. Further, said doctor and nurses testified that the defendant was suffering from serious open wounds, was in pain and was suffering from trauma and shock.

The omitted question, raised by defendant in his motion to dismiss, which the Court must decide is whether or not there was probable cause for the law enforcement officer to believe that the defendant had committed the offense of driving or being in actual physical control of a vehicle while under the influence prior to the time when he obtained a blood sample from the defendant's body.

Clearly, I. C. 9-4-4.5-3 entitled "Opportunity to submit to chemical test prior to arrest." establishes a condition precedent to an invocation of the procedure under the implied consent law set forth in I. C. 9-4-4.5-1 through 9-4-4.5-6. Under such statute, before a law enforcement officer can proceed to offer a suspect the opportunity to submit to a chemical test for intoxication, such officer must have probable cause to believe that such person has committed the offense of driving while under the influence. Probable cause is defined in I. C. 9-4-4.2(b) as follows:

> "The term 'probable cause' for the purposes of this chapter shall mean the same as the term 'reasonable grounds', i. e., facts and circumstances known to the officer which would warrant a prudent officer to believe that the offense in question had been committed."

Further I. C. 9-4-4.5-4(a) sets forth examples as to how probable cause for driving under the influence may be determined. The examples are as follows: (i) Erratic or unusual driving behavior; (ii) Appearance of accused when detained, i. e., watery or bloodshot eyes, flushed or pale face, expanded or contracted pupils of the eyes, condition of clothing, etc,; (iii) Behavior of accused when detained, i. e., ability to speak and/or express himself orally, finger dexterity, steadiness on feet, ability to perform simple test requiring normal coordination or balance, etc.; (iv) odor of alcoholic beverages, presence of alcoholic beverage container or drugs; (v) any other facts perceived by the law enforcement officer with reference to the accused or any report received from another person by the officer with reference to the accused, including reports of witnesses, physicians, psychiatrists, etc.

Therefore, it is very clear that the Indiana Implied Consent Law has adopted and uses the term "probable cause" in its ordinary and usual context. Therefore, an officer who merely "suspects" or has "strong reason to suspect" that a person has been driving under the influence, has no authority to proceed under the procedure of I. C.

9-4-4.5-3 and thereby obtain evidence in the form of the result of a chemical test for intoxication.

Having viewed the evidence presented in this case, in light of the probable cause requirement, it is very clear that there was not probable cause for Officer Kenneth Jennings of the City of Decatur, to believe that the defendant had committed the offense of driving under the influence, prior to his obtaining a blood sample from the defendant's body. Therefore, the blood sample extracted from defendant's body was illegally obtained and could not thereafter be used in a probable cause affidavit to support and be a basis for the issuance of an arrest warrant.

In all other particulars the Court's ruling on motion to dismiss and findings of facts and conclusions of law heretofore made and entered on the 25th day of February, 1975, shall remain in full force and effect and this supplemental ruling on motion to dismiss and Supplemental findings of facts and conclusions of law shall be considered only as an addition to the original ruling and shall not vary its terms or meaning.

/s/ Myles F. Parrish
Myles F. Parrish, Judge
Adams Circuit Court

Dated this 11th day of March, 1975.

"APPENDIX E"

STATE OF INDIANA
COUNTY OF ADAMS, SS:
STATE OF INDIANA
VS.
CLAYTON L. HUMMEL

IN THE ADAMS CIRCUIT COURT
JANUARY SESSION, 1975 TERM
CAUSE NO. 4442

SUPPLEMENTAL RULING ON MOTION TO DISMISS AND SUPPLEMENTAL FINDINGS OF FACTS AND CONCLUSIONS OF LAW

It now appears to the Court that the ruling of the Court heretofore made and entered in the above entitled cause on February 25, 1975, through inadvertence and mistake, omitted findings of fact and failed to rule on a question of law raised by defendant in his motion to dismiss.

In addition to the special findings of facts set forth in the Court's special findings of facts dated February 25, 1975, the Court further finds as follows, to-wit:

1. That the sample of blood extracted from the defendant's body was analyzed to determine its blood-alcohol content by a person not certified as a valid chemical test operator by the Department of Toxicology of the Indiana University School of Medicine, using techniques or equipment which had not been inspected or approved by the Department of Toxicology of the Indiana University School of Medicine.

2. That the Department of Toxicology of the Indiana University School of Medicine has not certified any persons, techniques or equipment for the making of a direct blood analysis for ethanol and has not inspected or approved any such techniques or equipment for the making of a direct blood analysis for ethanol.

3. The Court further finds that nurse Winona Eichar, although testifying that she did smell a small trace of alcohol upon defendant's breath, testified that she did not observe any symptoms of intoxication about the defendant at the time he was being treated in the emergency room shortly after the accident, that he was very cooperative, coherent, concerned about other persons injured in the accident and spoke intellegently and clearly, in light of the fact that he was suffering from a broken nose and other head injuries. Also, Dr. John Doan, who treated defendant in the emergency room shortly after the accident, the two ambulance drivers, Richard Linn and Elmer Winteregg,

who assisted defendant into and out of the ambulance, and nurse Ann Rumschlag, all testified that they failed to smell any odor of alcohol upon the defendant's breath and did not observe any symptoms of intoxication about the defendant whatsoever.

The omitted question, raised by defendant in his motion to dismiss, which the Court must decide is whether or not there was probable cause for the law enforcement officer to believe that the defendant had committed the offense of driving or being in actual physical control of a vehicle while under the influence prior to the time when he obtained a blood sample from the defendant's body.

Clearly, I. C. 9-4-4.5-3 entitled "Opportunity to submit to chemical test prior to arrest". establishes a condition precedent to an invocation of the procedure under the implied consent law set forth in I. C. 9-4-4.5-1 through 9-4-4.5-6. Under such statute, before a law enforcement officer can proceed to offer a suspect the opportunity to submit to a chemical test for intoxication, such officer must have probable cause to believe that such person has committed the offense of driving while under the influence. Probable cause is defined in I. C. 9-4-4.2(b) as follows:

> "The term 'probable cause' for the purposes of this chapter shall mean the same as the term 'reasonable grounds', i. e., facts and circumstances known to the officer which would warrant a prudent officer to believe that the offense in question had been committed."

Further, I. C. 9-4-4.5-4(a) sets forth examples as to how probable cause for driving under the influence may be determined. The examples are as follows: (i) Erratic or unusual driving behavior; (ii) Appearance of accused when detained, i. e., watery or bloodshot eyes, flushed or pale faced, expanded or contracted pupils of the eyes, condition of clothing, etc.; (iii) Behavior of accused when detained, i. e., ability to speak and/or express himself orally, finger dexterity, steadiness on feet, ability to perform simple test requiring normal coordination or balance, etc.; (iv) odor of alcoholic beverages, presence of alcoholic beverage container or drugs; (v) any other facts perceived by the law enforcement officer with reference to the accused or any report received from another person by the officer with reference to the accused, including reports of witnesses, physicians, psychiatrists, etc.

Therefore, it is very clear that the Indiana Implied Consent Law has adopted

and uses the term "probable cause" in its ordinary and usual context. Therefore, an officer who merely "suspects" or has "strong reason to suspect" that a person has been driving under the influence, has no authority to proceed under the procedure of I. C. 9-4-4.5-3 and thereby obtain evidence in the form of the result of a chemical test for intoxication.

Having viewed the evidence presented in this case, in light of the probable cause requirement, it is very clear that there was not probable cause for Officer William Kuhn of the Indiana State Police Department, to believe that the defendant had committed the offense of driving under the influence, prior to his obtaining a blood sample from the defendant's body. Therefore, the blood sample extracted from defendant's body was illegally obtained and could not thereafter be used in a probable cause affidavit to support and be a basis for the issuance of an arrest warrant.

In all other particulars the Court's ruling on motion to dismiss and findings of facts and conclusions of law heretofore made and entered on the 25th day of February, 1975, shall remain in full force and effect and this supplemental ruling on motion to dismiss & Supplemental findings of facts and

conclusions of law shall be considered as only an addition to the original ruling and shall not vary its terms or meaning.

/s/ Myles F. Parrish
Myles F. Parrish, Judge
Adams Circuit Court

Dated this 11th day of March, 1975.

APPENDIX F

No. 2-875A209
State of Indiana v.
Clayton L. Hummel, Joseph D. Smith

You are hereby notified that the Court of Appeal has on this day Appellee's Petition for Rehearing DENIED. Robertson, C. J.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action. WITNESS my name and the seal of said Court, this 11th day of July, 1977.

Billie R. McCullough
Clerk, Supreme Court
and Court of Appeals

APPENDIX G

No. 2-875A209
State of Indiana vs.
Clayton L. Hummel, Joseph D. Smith

You are hereby notified that the Indiana Court of Appeals has on this day denied Petition for Oral Argument. Givan, C. J. All Justices Concur. Denied Petition for Transfer, Givan, C. J. All Justices Concur.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court, this 20th day of December, 1977.

Billie R. McCullough
Clerk, Supreme Court
and Court of Appeals

Supreme Court, U. S.
FILED
APR 19 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

NO. 77-1319

Joseph D. Smith
Clayton L. Hummel, Petitioners,

-vs-

State of Indiana, Respondent

****

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE INDIANA COURT OF APPEALS

****

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IN THE

SUPREME COURT OF THE UNITED STATES

NO. 77-1319

JOSEPH D. SMITH,
CLAYTON L. HUMMEL, Petitioners,

-vs-

STATE OF INDIANA, Respondent.

****

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE INDIANA COURT OF APPEALS

****

Petitioners, Clayton L. Hummel and Joseph D. Smith, by their counsel, Joseph M. Johnson, respectfully submit this brief in support of their Petition for Writ of Certiorari, filed herein on March 20, 1978.

This brief is filed pursuant to Supreme Court Rule 24(5) which provides:

> "Any party may file a supplemental brief at any time while a petition for writ of certiorari is pending calling attention to new cases or legislation or other intervening matter not available at the time of his last filing."

On January 31, 1978, the Indiana Court of Appeals rendered a decision in a cause entitled: "Clark v. State (1978) ____ Ind. App. ____, 372 N.E. 2d 185." This decision, although rendered and

dated January 31, 1978, has not been reported in the official reports of the Indiana Court of Appeals, however, was reported in the West Publishing Co., North Eastern Reporter (Second Series) advance sheet, dated March 8, 1978, which was not received by petitioners' attorney until after the time when petitioners' petition was delivered to a printer for printing. Therefore, this decision was not available to petitioners until after the filing of their petition herein.

Although, the Indiana Court of Appeals was considering a different aspect of the Indiana Implied Consent Statute in Clark v. State, supra, the Court again dealt with the applicability of the statute in criminal prosecutions for driving while under the influence of intoxicating liquor - causing death of another person (Ind. Code 9-4-1-54(b)(1), the offense for which petitioners were arrested and charged.

In spite of the clear language of the Indiana Implied Consent Statute and in complete disregard to its prior judgments in the cases Klebs v. State (1974) ____ Ind. App. ____, 305 N.E. 2d

781, and Jones v. State (1974) ____ Ind. App. ____, 315 N.E. 2d 403, in the judgment sought to be reviewed, the Indiana Court of Appeals held that:

> (1) It was not necessary for arresting officers to first offer petitioners the opportunity to submit to a "chemical test" for intoxication, as defined in Ind. Code 9-4-4.5-2(d), before arresting them for violations of Ind. Code 9-4-1-54(b) (Appendix A, p. 7);
>
> (2) The failure of the arresting officers to offer petitioners the opportunity to submit to a "chemical test" for intoxication in no way affected the validity of their arrest (Appendix A, p. 10);
>
> (3) The only purpose for implementing the "mandates" of the Implied Consent Statute was for the revocation of driving privileges for a period of one year (Appendix A, p. 10 and 17); and
>
> (4) The results of the tests of blood samples extracted from petitioners' bodies, which were not "chemical tests" as defined in Ind. Code 9-4-4.5-2(d) and which were not administered and performed by persons "certified as valid chemical test operators" as required by Ind. Code 9-4-4.5-3, were admissible as evidence in the trial court's probable cause for arrest determinations. (Appendix A, p. 16)

Commencing with the Motions to Dismiss filed by petitioners, in the trial court,

and through this entire proceeding, inter alia, petitioners have asserted that, pursuant to the Implied Consent Statute:

> (1) They had an absolute right to and it was necessary that petitioners be offered the opportunity to submit to a "chemical test", i. e., a test defined in Ind. Code 9-4-4.5-2(d) before their arrest;
>
> (2) The failure of the arresting officers to offer petitioners the opportunity to submit to a "chemical test" rendered their arrests illegal as in violation of the Fourth Amendment to the Constitution of the United States;
>
> (3) The purposes of the implied consent statute were to assure the accuracy and reliability of chemical tests, to impose strictures and requirements on the use of chemical tests as evidence in prosecutions for driving while under the influence of intoxicating liquor and related offenses contained in Ind. Code 9-4-1-54(b), and to protect innocent persons from being subjected to the jeopardy of prosecutions for such offenses, rather than, the mere revocation of driving privileges in instances where persons refuse an offered opportunity to submit to a test; and
>
> (4) The tests of the blood samples extracted from petitioners' bodies were not "chemical tests" within the statutory definition of such term in Ind. Code 9-4-4.5-2(d), therefore, the

> extractions and tests were illegal searches and seizures under the Fourth Amendment to the Constitution of the United States and were inadmissible as evidence, for any purpose.

The case of Clark v. State (I978) ____ Ind. App. ____, 372 N.E. 2d 185, clearly follows petitioners' arguments. Most significantly, the Court held that the Implied Consent Statute was applicable in prosecutions for driving under the influence, reckless homicide and causing death while driving under the influence, and recognized that under the Implied Consent Statute, before a person can be arrested, he must be offered the opportunity to submit to a chemical test for intoxication, as required by Ind. Code 9-4-4.5-3. Two aspects of the opinion should be noted: First, the opinion was written by the same division of the Indiana Court of Appeals, it having three divisions, which wrote the opinion sought to be reviewed. Second, the person who made the "chemical test" of the subject's blood in the Clark case, Lt. Paul Assa of the Indiana State Police, was the same person who performdd the test of petitioner, Smith's, blood sample; however, at the time Lt. Assa made the test in the Clark case, he was a "certified chemical test

operator" (372 N.E. 2d at 187), and at the time he performed the test of Smith's blood sample, he was not a "certified operator".

The facts in Clark v. Smith, supra, were as follows: After a motor vehicle accident, as result of which persons were killed, Clark, one of the drivers, was taken to a hospital. At the hospital, a police officer asked Clark to submit to the taking of a blood sample for a blood test, to which Clark agreed, orally and in writing. A blood sample was extracted and tested, apparently by Lt. Paul Assa, a "certified chemical test operator". Clark was subsequently arrested, charged and convicted. At Clark's trial, Lt. Paul Assa, a "certified chemical test operator", testified that the blood sample had an alcohol content of .283%. On appeal, Clark contended that the trial Court erred in allowing admission of evidence concerning the chemical analysis of the blood sample extracted from his body, for the reason that his consent to the taking of the blood sample was not made knowingly and voluntarily. Therefore, Clark's challenge to the admissibility of such evidence is on different grounds than those asserted

by petitioners here, nevertheless, the rationale of the Court and the basis for reviewing the question for admissibility of such evidence is relevant here.

In commencing its review of the question, the Court commenced by referring to and quoting Ind. Code 9-4-4.5-1 (portion of the Statute which states that driver's impliedly consent to a chemical test), Ind. Code 9-4-4.5-2(d) (portion of the statute which defines the term "chemical test") and Ind. Code 9-4-4.5-3 (portion of the statute which provides that a person shall be offered the opportunity to submit to a chemical test before being placed under arrest and if the test results in prima facie evidence that the person is not under the influence, he shall not be arrested for such offense but shall be released immediately).

The Court, after reviewing the above portions of the Implied Consent Statute, stated:

> "The statutory provisions set forth in the Implied Consent Statute apply not only to the crime of Driving Under the Influence but also to the crimes of Reckless Homicide and Causing a Death While Driving Under the Influence, the crimes for which Clark was convicted here.

> Pursuant to the provisions of this act, Clark was not placed under arrest at the time Trooper Boaz asked him to consent to the taking of a blood sample." (372 N. E. 2d 185 at 189)

Such observations of the Court, while totally correct, collide violently with the judgment here sought to be reviewed, where the Court observed and stated:

> "The trial court was of the opinion that before an arrest could be lawful, it was necessary for the arresting officer to first accord the arrestee an opportunity to submit to a chemical test to discover the extent, if any, of the driver's intoxication (Appendix A, p. 7)
>
> * * * *
>
> The failure of an arresting officer to accord the individual arrested an opportunity to be chemically tested for the presence of alcohol in his blood in no way affects the validity of his arrest." (Appendix A, p. 10)
>
> * * * *
>
> "Hummel and Smith contend the affidavits were insufficient because based in part on the results of an illegal search and seizure ...
>
> At the outset we reject Hummel's and Smith's contention that the blood tests could not properly be considered by the magistrate solely because the

> arresting officer did not comply with the Implied Consent Statute by first offering Hummel and Smith the opportunity to take a test before being placed under arrest, and because the equipment and test operator were not properly certified. (Appendix A, p. 16)
>
> * * * *
>
> Therefore, since the probable cause affidavits were not used for the purpose of implementing the mandates of the Implied Consent Statute, i. e., the revocation of driving privileges for a period of one year, the trial court erred in considering the results of the blood tests for the reasons argued by Hummel and Smith." (Appendix A, p. 17)

The Clark, decision is in complete allign with the Court's decisions in Klebs and Jones, which are cited and thoroughly discussed in petitioners' petition, and further accentuates the invidiousness of the discriminatory and arbitrary treatment of petitioners, affected by the judgment of the Indiana Court of Appeals sought to be reviewed, in violation of their rights to due process and equal protection of the law, guaranteed to them under the Fourteenth Amendment to the Constitution of the United States.

Respectfully submitted,

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1319

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Petitioners,

vs.

STATE OF INDIANA,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA

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OPINION BELOW

The opinion of the Court of Appeals of Indiana, First District, is reported in 363 N.E. 2d 227.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3), and to have this Court review a decision issued by the Indiana Court of Appeals. Respondent would assert that this Court has no jurisdiction under that statute since the Petitioner did not

raise any federal question or issue in the Courts below and only asserted those issues on petition to this Court.

QUESTION PRESENTED

1. Whether, notwithstanding an implied consent statute which provides that, when a law enforcement officer has probable cause to believe a person has been driving under the influence of intoxicating liquor, he shall not arrest such person on such charge until he has offered such person an opportunity to take a chemical test for intoxication and providing that, if such person shall refuse to submit to such test or submits and is found thereby to be intoxicated, such person may at a preliminary hearing for such purpose have his driving license suspended for one year and that if such officer did not have probable cause to believe that such person had been driving under the influence of intoxicating liquor or that the officer did not comply with the statute, his license shall be returned to him and the Court shall then proceed with arraignment on the charge, such officer may nevertheless, without compliance with the implied consent statute, arrest such person on a charge of causing the death of another by driving while driving under the influence of intoxicating liquor, under another statute authorizing such arrest when such officer has probable cause to believe such person guilty of such offense.

2. Whether the extraction of a blood sample from the body of one suspected of driving under the influence of liquor without compliance with an implied consent statute, constituted unreasonable search and seizure, notwithstanding the consent of such person to such extraction.

3. Whether the arrest of one upon a warrant issued pursuant to a probable cause hearing at which evidence of

blood samples obtained by unreasonable search and seizure was presented together with other evidence sufficient to establish probable cause was an unreasonable seizure of the person of such person under the Fourth Amendment to the Constitution of the United States.

4. Whether warrants for the arrest of persons suspected of driving under the influence of intoxicating liquor issued pursuant to probable cause affidavits set out in the Petition herein were invalid under the Fourth Amendment to the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the Constitution of the United States provides:

> *Unreasonable searches and seizures.*—The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the Constitution of the United States provides in part:

> § 1. *Citizenship—Due process of law—Equal protection.*—All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

The Indiana statutes involved herein are as follows:

IC 9-4-1-54(b)(1) "(b) *Operating or driving while under the influence of intoxicating liquor or narcotic or other drugs.*—Any person who operates or drives a vehicle while that person is under the influence of intoxicating liquor or unlawfully under the influence of narcotics or other habit forming or dangerous depressant or stimulant drugs shall be guilty of a criminal offense.

(1) Any person who while under the influence of intoxicating liquor or unlawfully under the influence of narcotic or other habit forming or dangerous, depressant or stimulant drugs operates or drives a vehicle and when so operating or driving causes the death of another person, is guilty of a felony and, upon conviction, shall be imprisoned for a determinate period of not less than one [1] year nor more than five [5] years; or shall be imprisoned for a determinate period of not less than one [1] year nor more than two [2] years to which shall be added a fine of not less than two hundred fifty dollars [$250] nor more than five thousand dollars [$5,000]. Upon conviction, the court shall recommend the suspension of the current driving license of the person so convicted for a period of one [1] year and the commissioner of motor vehicles shall comply with the recommendations, and should the court fail to make the mandatory recommendation, or should the court fail to make the appropriate mandatory recommendation, the commissioner shall proceed to act in the matter as if such recommendation had been made by the court. During the three [3] years following the termination of the suspension, the commissioner may not issue a license to that person unless that person provides and maintains proof of financial responsibility in force pursuant to IC 9-2-1 [9-2-1-1—9-2-1-45]."

IC 9-4-1-134. "*Arrest for violations.*—A peace officer may, without a warrant, arrest a person, in

case of violations of section 39[9-4-1-40] of this act and section 52(b) [subsection (b) of 9-4-1-54] of this act if the violation of said section 52(b) [subsection (b) of 9-4-1-54] is coupled with accident which in fact has been committed, though not in his presence, when he has reasonable cause to believe that the violation was committed by such person. The procedure prescribed herein shall not be exclusive of any other method prescribed by law for the arrest and prosecution of a person for an offense of like grade."

IC 9-4-4.5-3. "*Opportunity to submit to chemical test prior to arrest.*—Any law enforcement officer authorized to enforce the laws of this state regulating the use and operation of vehicles on public highways who has probable cause to believe that any person has committed the offense of driving or being in actual physical control of a vehicle while under the influence, in his presence or view, or who has *probable cause to believe that any person who has been involved in a motor vehicle accident has commited such offense, though not in his presence or view, shall not place such person under arrest for such offense until he has first offered to such person the opportunity to submit to a chemical test for intoxication* to be administered by a person certified as a valid chemical test operator by the department of toxicology of the Indiana University school of medicine. Any such person who agrees to submit to such chemical test for intoxication shall not be arrested for driving while under the influence, but shall accompany the officer to the nearest available chemical test device for the purpose of taking such test as a condition of the driving privilege, (a) If such chemical test results in prima facie evidence that such person is not under the influence, he shall not be arrested and charged with such offense and he shall be released immediately." (Emphasis supplied.)

IC 9-4-4.5-4. *"Refusal to submit—Judicial hearing prior to arraignment—Matters to be determined —Findings.*—When a certification of refusal to submit to a chemical test is submitted to the court, it shall hold a separate hearing on the matter of the test refusal, prior to the arraignment on the criminal charge, for the determination of the following matters:

"(a) Did the law enforcement officer have probable cause to believe that the accused had committed the offense of driving or being in actual physical control of a vehicle while under the influence? . . .

"(b) Did the law enforcement officer offer to the accused the opportunity to submit to a chemical test for intoxication before placing the accused under arrest for such offense, and was the accused physically and mentally able to provide a breath sample? . . .

"(c) The defendant shall be entitled to reasonable written notice of the separate hearing and shall have the right to attend the hearing in person, with or without legal counsel, and to present evidence. The defendant shall also be entitled to examine or cross-examine a witness who presents evidence at the separate hearing. After the issues in (a) and (b) above are determined, the court shall then determine whether or not the accused did in fact refuse to submit to a chemical test for intoxication.

"If the court finds that a refusal to submit to a chemical test for intoxication was because of mental or physical incapacity not related to intoxication, such refusal and the reasons therefor shall be reported to the commissioner of motor vehicles for such action as shall be deemed proper by him on the form provided by the commissioner. If the court finds that the mental or physical incapacity would affect the driving ability of the accused, it

shall forward such finding to the commissioner of motor vehicles along with the current driving license of the accused, otherwise, the driving license shall be returned to the accused.

"If the court finds that such refusal was made wilfully and knowingly or because of the state of intoxication of the accused, it shall forward such finding to the commissioner of motor vehicles on a form to be provided by the commissioner, along with the current driving license of the accused, and it shall recommend to the commissioner that the driving privileges of the accused remain suspended for a period of one [1] year from the date of said finding, and the commissioner shall comply with said recommendation.

"If the court finds that the accused did not refuse to submit to a chemical test for intoxication or if the court finds that the law enforcement officer did not properly proceed under this chapter, no further action shall be taken under this chapter [9-4-4.5-1—9-4-4.5-6], and the court shall proceed with the arraignment, unless the finding includes one of lack of probable cause, in which case the charge of driving or being in actual physical control of a vehicle while under the influence shall be quashed upon the motion of the court." (Emphasis supplied.)

STATEMENT OF THE CASE

On September 20, 1974, in the case of the Petitioner Joseph D. Smith, a police officer executed and presented an affidavit of probable cause for issuance of an arrest warrant for said Petitioner, which affidavit, omitting caption, signature, and jurat reads as follows:

> "The undersigned, being first duly sworn upon his oath, deposes and says: "That he is a police officer for the City of Decatur, and did have occasion on the 12th day of September, 1974, to investigate an

accident in the City of Decatur, wherein, the undersigned did determine from various witnesses and in the said investigation that the above named Defendant was driving an automobile and did pass a certain car on the right leaving the travelled portion of the roadway and did come back on said highway, and cross the center-line and crash into a car driven by Mark Allan Woodard, as a result of which accident the said Mark Allan Woodard did thereafter die.

"The undersigned further states that he did smell alcohol upon the breath of the above named Defendant and did procure a blood sample from said Defendant and said sample has subsequently revealed an alcoholic content in excess of the legal presumption of an intoxicated person under the Statute as charged herein.

"WHEREFORE the undersigned prays that upon hearing held the Court issue a warrant for the arrest of the Defendant herein as charged in the Information filed herewith."

On September 26, 1974, in the case of Petitioner Clayton L. Hummel, a police officer executed and presented an affidavit of probable cause for issuance of a warrant for the arrest of said Petitioner, which affidavit, omitting caption, signature, and jurat reads as follows:

> "The undersigned, being first duly sworn upon his oath, deposes and says: "That he is a police officer for the Indiana State Police and did have occasion on the 16th day of September, 1974, to investigate an accident in Adams County, Indiana, wherein the undersigned did determine from various witnesses in said investigation that the above named Defendant was driving an automobile and did crash into the rear of a certain horse drawn buggy as alleged in the Affidavit filed herewith, as a result of which accident two persons, namely, Jonas E. Hilty and Pete E. Hilty, then and there died.

> "The undersigned further states that he did smell alcohol upon the breath of the above named Defendant at the scene of said accident and did procure a blood sample from said Defendant and said sample has subsequently revealed alcoholic content in excess of the legal [p]resumption of an intoxicated person under the Statute as charged herein.
>
> "WHEREFORE, the undersigned prays upon hearing held, the Court issue a warrant forthwith for the arrest of the Defendant herein."

On September 20, 1974, the State of Indiana filed an information in the Adams Circuit Court, Adams County, Indiana, charging the Petitioner, Joseph D. Smith, with causing the death of Mark Allen Woodard by operating a motor vehicle while under the influence of intoxicating liquor. On September 27, 1974, the State of Indiana filed an information in the Adams Circuit Court charging the Petitioner, Clayton L. Hummel, with causing the deaths of Jonas E. Hilty and Pete E. Hilty by operating a motor vehicle while under the influence of intoxicating liquor.

On December 9, 1974, both Petitioners filed motions to dismiss their respective cases on the grounds that the respective actions were untimely brought and that the trial court did not have jurisdiction of the respective defendants. No federal constitutional issues were raised at this time. On January 3 and 10, 1975, the Adams Circuit Court held an evidentiary hearing on these motions, and on February 27, 1975, granted both motions, holding among other things that:

1. I.C. 9-4-4.5-1—9-4-4.5-6 superseded in part I.C. 9-4-1-134.

2. The State's affidavits of probable cause for the arrest of the defendants were insufficient.

3. The respective arrests of the defendants were illegal and, therefore, the trial court had no jurisdiction of the

respective causes; and the defendants were entitled to have the respective informations against them dismissed.

4. The officers executing the probable cause affidavits did not have probable cause to believe the respective defendants had committed the offense of operating a motor vehicle while under the influence of intoxicating liquor prior to taking blood tests and such blood tests were taken illegally.

The State of Indiana appealed this action of the trial court to the Court of Appeals of Indiana. The Court of Appeals consolidated the two appeals, and on May 26, 1977, reversed the Adams Circuit Court with an opinion reported at 363 N.E. 2d 277, holding that I.C. 9-4-1-134 was not superseded in part by I.C. 9-4-4.5-3 and that the probable cause affidavits were sufficient to allow a neutral magistrate to determine that probable cause existed for the issuance of warrants for the arrest of the Petitioners. Petitioners filed a petition for rehearing, which was denied July 11, 1977. Petitioners then filed a petition for transfer of the appeal to the Supreme Court of Indiana, which petition was denied by that Court on December 20, 1977. The Petitioners then filed their petition for writ of certiorari in this Court attempting to raise the federal constitutional issue for the first time.

No determination of the guilt or innocence of Petitioners has been made. The decision of the Court of Appeals of Indiana merely reversed the dismissal of the Adams Circuit Court and the causes are back in that court for trial on their merits.

The facts involved in the two cases are as follows:

James Rich lived at Geneva in Adams County, Indiana, and was employed at the International Harvester Company. On September 12, 1974, he got off work and at about

eleven o'clock at night was driving southward on Road 27 approaching the city of Decatur. A car approached him from the rear, passed him on the right, going into the ditch to do so, cut in front of him, and crossed to the left side of the road, striking a northbound car. After striking the northbound car, the car spun around and came back toward Rich, forcing him to go into the right-hand ditch to avoid being struck. (Tr. pp. 217-219).

Rich stopped the car, got out, and went to the car that had passed him. The left front door was standing open and there was no one in the front seat. He then went to the other vehicle and saw Mark Allen Woodard pinned under the steering wheel. He saw some people coming out of a house near the highway, went over, and asked them to call the police and an ambulance. He then returned to the car that had passed him and found Joseph D. Smith, Petitioner herein, sitting in the back seat (Tr. pp. 219-221).

Sergeant Kenneth B. Jennings, of the Decatur Police Department, arrived at the scene at 11:34 P.M. He saw Joseph D. Smith still in his car and detected the strong odor of alcohol on his breath. There were five beer cans in and near the car and one of them had been opened. He discussed the accident with James Rich. Ambulances arrived and took both drivers to the hospital. Officer Robert Noack, of the Decatur Police Department, went to the hospital and obtained a sample of Smith's blood for analysis for alcohol content. He also smelled alcohol on Defendant's breath. (Tr. pp. 182-192, 265-268).

Shortly before midnight on September 16, 1974, Mr. and Mrs Hilty, and their twin babies, Jonas U. and Pete E. Hilty, were driving their horse and buggy southward on Road 27, approaching the city of Berne, Indiana. The buggy had two lights, numerous reflectors and an orange

triangle, the official symbol designating a slow-moving vehicle. (Tr. pp. 247-310).

At the same time, the Petitioner Clayton L. Hummel was driving his automobile, approaching the buggy from the rear, at a speed of at least seventy miles per hour. He applied his brakes, skidding fifty-four feet before striking the buggy and continuing to skid for a total skid of 279 feet and two inches. (Tr. pp. 198, 202, 268, 266, 279).

Trooper William Kuhn of the Indiana State Police was in Berne when a radio call concerning the collision was received and hurried to the scene. He found Petitioner Clayton L. Hummel lying on the berm near his car, bleeding from his nose and a cut on his forehead. He placed a bandage on the cut, noticing as he did so a strong odor of alcohol on Hummel's breath. Going to Mr. Hilty he learned that Hilty's two sons had been with him. When he located the two boys, he found them to be dead. Turning to Hummel, he observed him on his feet, walking unsteadily, hesitantly, and in a wavering line. He asked him if there had been anyone else with him and he replied that there had not, speaking with thick speech. He also noticed that Defendant had bloodshot eyes. From the length of the skid marks he estimated Hummel's speed to have been at least seventy miles per hour (Tr. pp. 191-194, 275-284).

Ambulances arrived and the injured were taken to the hospital (Tr. pp. 195, 205, 210, 212, 214, 297, 311, 312). Sgt. Kenneth Jennings, of the Decatur Police Department, was asked to go to the hospital and obtain a blood sample from both drivers. He arrived at the hospital just as Hummel was brought in. He informed the nurse on duty in the emergency room of the police's desire for a blood sample. The nurse went to Hummel and said, "We need

a blood sample for the police. May we take one?" (Tr. pp. 313-335).

Hummel replied, "It is all right." (Tr. p. 316).

The nurse drew the sample, placed it in a small bottle, labeled it, and handed it to Sgt. Jennings (Tr. p. 316).

ARGUMENT

I.

NOTWITHSTANDING INDIANA'S IMPLIED CONSENT STATUTE, A LAW ENFORCEMENT OFFICER WHO HAS PROBABLE CAUSE TO BELIEVE THAT A PERSON HAS CAUSED THE DEATH OF ANOTHER BY DRIVING UNDER THE INFLUENCE OF INTOXICATING LIQUOR MAY, WITHOUT COMPLIANCE WITH THE IMPLIED CONSENT STATUTE, ARREST SUCH PERSON ON SUCH CHARGE.

Petitioners acknowledge that they did not raise the constitutional question attempted to be presented herein in their briefs in the Court of Appeals of Indiana and acknowledge the general rule that the Supreme Court of the United States will not consider questions not raised by the record brought before it and which were not considered by the courts below, but ask that an exception to such rule be made. They state that assertions of such questions in the Indiana Court would have been "at most an improper assertion of abstract of hypothetical questions." It is difficult to comprehend how any thing more can be presented in their Petition to this Court.

The decision of the Court of Appeals of Indiana does no more than to decide that Petitioners must stand trial in the Adams Circuit Court on the charges against them. It made no decision as to the merits of such charges nor as to what evidence would be admissible against them.

Petitioner cites *Anderson v. United States,* 417 U.S. 211 (1974), as supporting the existence of exceptions to the above rule, but that case does not so hold and no question of exceptions to the general rule was involved in it. They also cite *Youakim v. Miller,* 425 U.S. 231 (1976). That case originated, not in a State Court, but in a Federal District Court and stated the exception to the general rule as follows:

> "Its usual formulation is that 'it is only in exceptional cases *coming here from the federal courts* that questions not pressed or passed upon are reviewed.' " (Emphasis added)

Under that case Petitioners are clearly excluded from the exception to the general rule and this case is not subject to review by this Court at this time.

Petitioners cited *Klebs v. State* (1974), — Ind. App. —, 305 N.E. 2d 781, in support of their first issue. In that case the application of the Implied Consent Law to arrests under I.C. 9-4-1-134 was not an issue and was not decided. The State's only contention was that it had complied with the Implied Consent Law. Although the Court held that the breathalyser test was not admissible in evidence, it did not dismiss the charge, but affirmed the conviction because of the showing in the record of other sufficient evidence of the appellant's intoxication. *Jones v. State* (1974), — Ind. App. —, 315 N.E. 2d 403, also cited by petitioner is likewise not authority for Petitioners' contention. The police in *Jones* attempted to comply with the Implied Consent Law, but the State failed to prove that the device used had been inspected and approved by the Department of Toxicology. No question was raised as the application of the Implied Consent Statute to arrests under I.C. 9-4-1-134.

Petitioners cite *Rose v. State* (1976), — Ind. App. —, 345 N.E. 2d 257. In that case there was no question involving the Implied Consent Law. The appellant did not contend that the police had not complied with the statute. Appellant's only contention was that he had not been driving, but the Court of Appeals held that being found alone in the car in a traffic lane with the motor running was sufficient evidence of violation of the statute and affirmed his convictions.

This appears to be the first appeal involving the application of the Implied Consent Law to arrests under I.C. 9-4-1-134. I.C. 9-4-4.5-6 of the *Implied Consent Statute* contains the provision:

> "No chemical test for intoxication shall be considered as evidence *for the purpose of this chapter* if it is not performed by a person certified as a valid operator by the state department of toxicology of the Indiana University School of Medicine." (Emphasis added).

The statute strictly limits the restriction on use of the test as evidence to "the purpose of the chapter", *i.e.* the Implied Consent Law. This limitation of application is further emphasized by I.C. 9-4-4.5-4 of the Implied Consent Law, which contains the provision:

> "If the court finds that the accused did not refuse to submit to a chemical test for intoxication or if the court finds that the law enforcement officer did not properly proceed under this chapter, no further action shall be taken under this chapter, *and the court shall proceed with the arraignment,* unless the finding includes one of lack of probable cause, in which case the charge of driving or being in actual physical control of a vehicle while under the influence shall be quashed upon the motion of the court." (Emphasis added).

Petitioners exaggerate the significance of the statement by the Court in *Jones* that the Implied Consent Law and I.C. 9-4-1-54(b) are in *pari materia.* The phrase means no more than that the two statutes are not in conflict and the later one does not repeal or supersede the prior one. *State v. Gerhardt* (1896), 145 Ind. 439, 44 N.E. 469. That condition of the statutes here concerned is secured by the phrases in sections 9-4-4.5-4 and 9-4-4.5-6 of the Implied Consent Law limiting it to "the purposes of this chapter".

The question of the application of the Implied Consent Law to arrests under I.C. 9-4-1-134 does not appear to have been decided before. *Klebs, Jones,* and *Rose* were not decided by the highest court in the State of Indiana, but by the Court of Appeals and there appears to have been no petition to transfer in any of them. In the case at bar, the Court of Appeals of Indiana has decided:

> "The failure of an arresting officer to accord the individual arrested an opportunity to be chemically tested for the presence of alcohol in his blood in no way affects the validity of his arrest. The only effect of the arresting officer's failure to provide the arrestee with the chemical test provided for in the Implied Consent Statute would be the person arrested could not have his driver's license suspended for a period of one year prior to trial.
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> "Therefore, since the probable cause affidavits were not used for the purpose of implementing the mandates of the Implied Consent Statute, i.e. the revocation of driving privileges for a period of one year, the trial court erred in not considering the results of the blood tests for the reasons argued by Hummel and Smith."

The denial by the Supreme Court of Indiana of Petitioners' petition for transfer affirms the decision of the Court of

Appeals and the above holdings are now the law of the State of Indiana.

The Court of Appeals also held that Hummel waived all objections to the blood test by consenting to it and that blood was illegally extracted from Smith, but that the probable cause affidavit contained sufficient evidence without the blood test to permit the issuance of the arrest warrant. By the judgment of the Court of Appeals the cases against Hummel and Smith go back to the Adams Circuit Court to be tried on their merits. No decision has been made as to whether the blood tests will be admissible at the trial.

II.

THE EXTRACTION OF A BLOOD SAMPLE FROM THE BODY OF ONE SUSPECTED OF DRIVING UNDER THE INFLUENCE OF INTOXICATING LIQUOR, WITHOUT COMPLIANCE WITH INDIANA'S IMPLIED CONSENT LAW, DID NOT CONSTITUTE UNREASONABLE SEARCH AND SEIZURE NOTWITHSTANDING THE CONSENT OF SUCH PERSON TO SUCH EXTRACTION.

The Court of Appeals of Indiana held, that although compliance with the Implied Consent Statute in the extraction of the blood samples was not necessary, the extraction of a sample from Smith was an illegal search and seizure because it was not taken as an incident to a lawful arrest. The extraction of a sample from Hummel was legal, solely because he consented to it.

The hospital nurse approached Hummel and said, "We need a blood sample for the police. May we take one?" Hummel replied, "It is all right." (Tr. pp. 313-316).

Petitioners argue that Hummel's consent was limited to a blood sample under the Implied Consent Statute. It was not so stated.

III.

THE ARREST OF PETITIONERS HEREIN ON WARRANTS ISSUED PURSUANT TO A PROBABLE CAUSE HEARING AT WHICH BLOOD TESTS WERE CONSIDERED WAS NOT AN UNREASONABLE SEIZURE OF THEIR PERSONS UNDER THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Petitioners characterized the averments of the probable cause affidavits as conclusions, but such is not the case except in the sense that all human thought is conclusions, either perceptual or logical. While the averments contain hearsay, it was hearsay communicated to the officers by eye-witnesses of the two accidents and such hearsay is competent to show probable cause for arrest. The fact that the informants of the police officers were eye-witnesses of the accidents was itself evidence of their credibility. It is not required that officers run a life history on their informants before crediting their information. Reasonable cause has been properly based upon radio messages or telephone calls. *Caine v. State* (1975), — Ind. App. —, 324 N.E. 2d 525; *Landrum v. State* (1975), — Ind. App. —, 338 N.E. 2d 666; *Manson v. State* (1967), 249 Ind. 53, 229 N.E. 2d 801. *cert den.* 88 S. Ct. 1198.

IV.

PETITIONERS' PETITION PRESENTS NOTHING FOR REVIEW.

As we have shown above, the warrants for Petitioners' arrests were issued on probable cause established by sufficient affidavits. However, even if their arrests could be regarded as invalid, such fact would not entitle them to have the informants against them dismissed. The invalidity of their arrests would entitle them to discharge from custody, but not to the dismissal of the information against them, which would continue pending until Petitioners were brought to court by valid arrests, subject of course to dismissal for want of prosecution if the State delayed unduly to obtain such arrests. *State ex rel. French v. Hendricks Superior Court* (1969), 252 Ind. 213, 247 N.E. 2d 519.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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